SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1933

No. 39

J. J NATHANSON, PETITIONER,

vs.

THE UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT

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[fols. a-1]

IN UNITED STATES DISTRICT COURT, DISTRICT OF NEW JERSEY

Case No. 1916b

UNITED STATES OF AMERICA

v.

MARTIN NATHANSON and J. J. NATHANSON

DOCKET ENTRIES

June 11, 1930.—Criminal Inf. for viol. Nat. Pro. Act &c. re intox. liquor &c., Act Oct. 28, 1919.

June 11, 1930.—Order for leave to file (same paper).

Jan. 23, 1931.—Req. for wits. Issg. 1 subpœna Issg. 3 copies.

Jan. 28, 1931.—Subs returned (1).

Feb. 2, 1931.—Motions to suppress evidence before Judge Avis.

Feb. 2, 1931.—Decision reserved.

Feb. 2, 1931.—M. M. Petition to suppress evidence & for return of property filed.

Feb. 2, 1931.—J. J. Petition to suppress evidence & for return of property filed.

Feb. 2, 1931.—Copy of Information to F. M. P. Pearse, Newark.

[fol. 2] Sept. 4, 1931.—Memorandum denying motion to suppress evidence, &c. filed (A).

Oct. 22, 1931,—Req. for witnesses Issg. 3 subpœnas. Issg. 4 copies.

Oct. 24, 1931.—Subs. returned (3).

Sept. 26, 1931.—Subs. returned (1).

Nov. 2, 1931.—Req. for witnesses Issg. 3 subpœnas. Issg. 5 copies.

Nov. 5, 1931.—Subs returned (2).

Nov. 7, 1931.—Subs returned (1).

Nov. 9, 1931.—Ordered off to Friday—Motion of F. M. P. Pearson & no jury.

Nov. 9, 1931.—Req. for witnesses Issg. 3 subpœnas. Issg. 5 copies.

Dec. 21, 1931.—Subs returned (1).

Jan. 29, 1932.—Req. for witnesses Issg. 3 subpœnas. Issg. 5 copies.

Feb. 2, 1932.—Subs returned (3).

Feb. 29, 1932.—J. J. N. Plea of Not Guilty. Ord. Bail continued.

Feb. 29, 1932.—Upon consent trial moved before John Boyd Avis, Judge without a jury as to J. J. N.

Feb. 29, 1932.—Stipulation made in record re 2 offenses, defendants, &c.

Feb. 29, 1932.—Motion to suppress, quash &c. (Reserved).

Feb. 29, 1932.—J. J. N. Order motion to suppress, quash Sch. Warrant, &c. denied.

Feb. 29, 1932.—Order exception allowed.

Feb. 29, 1932.—J. J. N. Order motion to direct acquittal denied.

[fol. 3] Feb. 29, 1932.—J. J. N. Order exception allowed.

Feb. 29, 1932.—J. J. N. VERDICT—GUILTY.

Feb. 29, 1932.—J. J. N.—Ordered bail continued.

Feb. 29, 1932.—M. N. Stipulation to bring in M. N. plead herein and abide result of this case in C. C. Appeals—entered in Stenographer's minutes.

Mar. 23, 1932.—J. J. N. Sentence—Fine $500.00 and stand committed in County Jail in custody of Attorney General until said fine is paid (A).

Mar. 23, 1932.—J. J. N. Petition for Appeal filed.

Mar. 23, 1932.—J. J. N. Assignment of Errors filed.

Mar. 23, 1932.—J. J. N. Order allowing appeal; and bail on appeal fixed at $1,000.00 which is to operate as a supersedeas bond (A).

Mar. 23, 1932.—J. J. N. Ordered Clerk take bail Recog. (38,018) drawn and filed.

Mar. 23, 1932.—J. J. N. Citation issued.

Mar. 23, 1932.—J. J. N. Citation returned (service acknowledged & cost bond waived).

Apr. 4, 1932.—M. N. & J. J. N. Order sentence continued to April Term 1932 (see Sundry 4262).

[fol. 4] IN UNITED STATES DISTRICT COURT, OF THE APRIL TERM, A. D. 1930

CRIMINAL INFORMATION—Filed June 11, 1930

DISTRICT OF NEW JERSEY, ss:

Be it remembered, that Walter G. Winne, Attorney of the United States of America for the District of New Jersey, who for said United States in this behalf prosecutes, in his own person comes here into said District Court of the United States for the district aforesaid on this 9th day of June, in the year of our Lord nineteen hundred and thirty, in this same term, leave of court first being had and obtained, and for the United States of America gives the court here to understand and be informed that Martin Nathanson and J. J. Nathanson, on or about the 1st day of May, in the year of our Lord nineteen hundred and thirty, at the City of Atlantic City in said State and District of New Jersey and within the jurisdiction of this court, did knowingly, wilfully and unlawfully possess whiskey, gin, benedictine, alcohol, sherry scotch, kimmel and rye, that is to say, intoxicating liquor, then and there containing more than one-half of one per centum of alcohol by volume, which was then and there fit for use for beverage purposes, pro-
[fol. 5] hibited by law and contrary to the form of the statute in such case made and provided and against the peace and dignity of the United States.

Phillip Forman, U. S. Attorney.

UNITED STATES OF AMERICA,
State of New Jersey, ss:

Before me, Wynn Armstrong, a United States Commissioner for the District of New Jersey, personally appeared Francis B. Laughlin, a duly appointed and qualified officer of the Customs, to wit: Customs Agent in Charge, Philadelphia, who being by me first sworn deposes and says:

1. That on May 1, 1930, having reasonable cause to suspect and believe that certain smuggled merchandise, viz: liquors of foreign origin were concealed in the residence of Martin Nathanson, 41 N. Newton Ave., Atlantic City, N. J., secured a search warrant for this residence from Judge William H. Smathers of Atlantic Co.

2. That on the same day, accompanied by Inspector Boeger, I served the warrant at about 2 P. M.

3. That after being admitted by the colored maid and presented to Mrs. Nathanson, a copy of the search warrant was handed to her.

4. That after permitting Mrs. Nathanson to attempt to get into touch with her husband by telephone, she was advised by me that it was necessary to proceed with the search without further delay, and

5. That accompanied by Mrs. Nathanson, I went to the cellar where I found the following liquors:

[fol. 6] 24 bots. Golden Wedding Rye Whiskey (qts.).
13 bots. Golden Wedding Rye Whiskey (qts.).
23 " Burkes' Gin.
24 " Gilbey's London Dry Gin.
4 " Benedictine.
1 " Creme de Menthe.
24 " Burnett's White Satin Gin.
35 " Ushers' Green Stripe Scotch Whiskey.
2 " Johnnie Walker Scotch Whiskey.
1 keg J. B. Sherriff & Co. Whiskey (partly filled).

6. That in addition to the above-mentioned liquors of foreign origin, I found a number of illegal slot machines and a quantity of alcohol in 5 gal. tins.

7. That when I removed the latter to the garage entrance for closer examination, I was observed by Agents Hommes, Aronson and Glanders of the Prohibition Service, who identified the contents as alcohol and made summary seizure of said alcohol in tins under the National Prohibition Act.

8. That the liquor was checked out and loaded on a truck and an inventory of the liquor removed was made on the back of the warrant and left with Mrs. Nathanson.

9. That the liquor was subsequently transported to Philadelphia and is now in the custody of the Collector in the Appraiser's Stores, 134 S. 2nd St., Philadelphia, Pa.

Frank B. Laughlin, Customs Agent in Charge.

And further deponent sayeth not.

Subscribed and sworn to before me this 20th day of May, 1930. Wynn Armstrong, U. S. Commissioner. (Seal.)

[fol. 7] UNITED STATES OF AMERICA,
State of New Jersey, ss:

Before me, H. R. Voorhees, a United States Commissioner for the District of New Jersey, personally appeared Francis B. Laughlin, a duly appointed and qualified officer of the Customs, to wit: Customs Agent in Charge, Philadelphia, who being by me first sworn deposes and says:

1. That on Thursday, May 1, 1930, having reasonable cause to suspect and believe that smuggled merchandise, viz: certain liquors of foreign origin were concealed in the premises at 117 N. Bartram Ave., Atlantic City, N. J., the occupant of the said residence being J. J. Nathanson, I secured from Judge William H. Smathers of Atlantic Co. a Customs search warrant for the aforesaid house.

2. That on Thursday, May 1, 1930, at about 2.30 P. M. accompanied by Inspector Boeger, I went to 117 N. Bartram Ave., but was unable to secure any response from the occupants.

3. That after an unsuccessful attempt to secure the attention of the occupants, I inspected the place from the outside finding that each of the cellar windows was backed up by a heavy wooden shutter secured by a crossbar.

4. That finding one of the cellar windows slightly open and the wooden shutter behind it about 2″ down from the top, I looked through the opening and observed a quantity of marine equipment, such as sea boots, glasses, engine oil, etc., several casks and some liquor in bundles.

5. That having observed this liquor, I removed the shutter and made an entrance into the cellar followed by Inspector Boeger.

[fol. 8] 6. That in the cellar I found the following liquors of foreign origin:

1 keg Isley Scotch Malt.

14 bots. Golden Wedding Rye Whiskey (qts.).
58 " Lincoln Inn Rye Whiskey.
70 " Booth's Gin.
16 " Benedictine.
16 " Peach Brandy.
1 " Wm. Penn Rye Whiskey.
7 " Johnnie Walker Scotch Whiskey.
11 " Apricot Brandy.
7 " Creme de Cocoa.
21 " Gilka Kimmel.
36 " Otard Cognac.
36 " Champagne.
229 " Chickencock Rye Whiskey (pts.).
85 " Old Mull Scotch Whiskey.

7. That in addition to the above list of liquors, a complete cutting plant was found, consisting of alcohol in 5 gal. tins, distilled water, extracts, such as oil of fennel, oil of juniper, etc., as well as labels, corks, seals and counterfeit revenue stamps.

8. That liquors were checked and an inventory of those removed was made on the reverse of the warrant which was handed to a woman who entered the house in the course of the search and who although obviously a resident there, refused to give her name.

9. That upon removing the alcohol in tins and other materials used in the manufacture of alcoholic beverages to the outside of the house in order to make a closer examination, I was observed by Agents of the Prohibition Service who identified the contents of the tins as alcohol and made summary seizure of them.

[fol. 9] 10. That the alcohol so seized, was retained in the custody of the Prohibition Agent in Charge, H. H. Porter, Atlantic City, N. J.

And further, deponent sayeth not.

F. B. Laughlin, Customs Agent in Charge.

Subscribed and sworn to before me this 24th day of May, 1930. Herbert R. Voorhees, U. S. Commissioner. (Seal.)

Leave of court is granted this eleventh day of June, 1930, to file the within criminal information.

Wm. N. Runyon, Judge.

[fol. 10] IN UNITED STATES DISTRICT COURT, DISTRICT OF NEW JERSEY

No. 1916b

UNITED STATES OF AMERICA

v.

MARTIN NATHANSON and JEREMIAH J. NATHANSON

Statement of Evidence

Transcript of Proceedings Taken Before Honorable John Boyd Avis, February 29, 1932

APPEARANCES

Honorable Phillip Forman, U. S. Attorney, for the Government.

John Griggs, Esq., Assistant U. S. Attorney; Frederic M. P. Pearse, Esq., for the defendant.

The Court: It is stipulated by counsel that the informalities of the information are waived, and it is considered as an information against Martin Nathanson for an alleged violation at 41 N. Newton Avenue, Atlantic City, and against Jeremiah J. Nathanson for an alleged violation at 117 North Bartram Avenue, Atlantic City, both of them having been alleged to have taken place on May 17, 1930. I think that states it, doesn't it?

[fol. 11] Mr. Pearse: Yes. I think it would be better if we let the Government file an amended information in each case.

The Court: Why cannot we take the testimony in the two cases?

Mr. Pearse: We can.

The Court: There are two cases involved, one against Martin and one against Jeremiah J. Nathanson, and it will be

considered by all parties as two cases alleged in one information.

Mr. Pearse: Yes. And then in the event we have to take an appeal that the Government will file an individual information as of time.

Mr. Forman: Yes.

FRANCIS LAUGHLIN, called and sworn as a witness in behalf of the Government, testified as follows:

Direct examination.

By Mr. Griggs:

Mr. Griggs: For the purpose of the record this first proof the Government is endeavoring to establish will be an alleged violation at 117 North Bartram Avenue, Atlantic City, N. J.

The Court: And involving Jeremiah J. Nathanson.

Mr. Griggs: Yes.

Mr. Pearse: I renew my motion to set aside the search warrant and suppress the evidence, and ask that the testimony be heard by the court and decision reserved pending the taking of testimony as to the manner in which the agent obtained his information.

[fol. 12] The Court: Do you mean you want to examine the witness in advance?

Mr. Pearse: Not in advance. I am asking your Honor to reserve decision until the coming in of the testimony in the case.

The Court: All right.

Q. You are a customs official and you were such on May 1, 1930?

A. I was.

Q. Did you apply before the Honorable William H. Smathers, Judge of Common Pleas of Atlantic County for a search warrant for the premises known as 117 North Bartram Avenue, Atlantic City, N. J.?

A. I did.

Q. And as a result of that search warrant did you visit those premises?

A. I did.

Q. And what did you find there?

A. We were unable to get a response when we first got to the house and could not find anyone in and waited around a considerable length of time and no one appeared. I went around and looked into one of the windows in the cellar, and when I looked through there in addition to the ordinary marine equipment, such as a lot of oil in casings and tins and a pair of field glasses, sea boots, and other such equipment I could see a few bottles of liquor. I, thereupon, entered into the cellar and found in a wooden gutter along one side of it the liquors listed on the back of the warrant which was returned.

Q. Now, did you execute that warrant? Did you serve it on anyone?

A. At that time, while the search was still in progress, but shortly after the liquors had been found, a lady who said that she was the occupant of the house, I believe it [fol. 13] was Mrs. Nathanson, if I am not mistaken, appeared there and I handed her the warrant and the receipt showing the liquors on the back.

Mr. Griggs: There is no question, I take it, relative to the alcoholic content?

Mr. Pearse: No.

The Court: Samples were taken, I suppose.

A. Yes, samples were taken, and I turned them over to our chemist, who is present in court.

Mr. Pearse: Subject to our objection as to the competency and relevancy of this testimony, we waive proof of the alcohol content of the merchandise which was seized, and which is enumerated on the back of the copy of the search warrant which with the Court's permission, I will now offer in evidence.

The Court: All right.

(Received and marked Exhibit D-1.)

[fol. 14] DEFENDANT'S EXHIBIT No. 1

Search Warrant

UNITED STATES OF AMERICA,
State of New Jersey:

The President of the United States of America to Francis B. Laughlin (Official title), Customs Agent in charge:

Whereas I, Wm. H. Smathers—a Judge of the Common Pleas of Atlantic County, New Jersey, upon consideration

of the facts set forth in the sworn complaint of Francis B. Laughlin (Official tile), Customs Agent in charge, filed with me, have examined said Francis B. Laughlin under oath, and

Whereas said Francis B. Laughlin has stated under his oath that he has cause to suspect and does believe that certain merchandise, to wit: Certain liquors of foreign origin a more particular description of which cannot be given, upon which the duties have not been paid, or which has otherwise been brought into the United States contrary to law, and that said merchandise is now deposited and contained within the premises of J. J. Nathanson said premises being described as a 2 story frame dwelling located at 117 No. Bartram Ave. (Give full description of premises to be searched), Atlantic City, N. J.; and

Whereas said Francis B. Laughlin has requested that a warrant issue to him, authorizing him to enter said premises and search for and seize said merchandise:

Now, therefore, you are commanded, in the name and by the authority of the President of the United States, to enter and search the premises hereinbefore described, in the daytime (if a dwelling house) at any time of the day or night (if other than a dwelling house) and to seize and [fol. 15] take into your possession the merchandise hereinbefore described, or so much thereof as may be found, to the end that the same may be dealt with according to law.

You are further commanded, in the event that you seize any of the above described merchandise, to give a copy of this warrant, together with a receipt for the property so seized, to the person from whom it is taken or in whose possession it is found, or in the absence of such person, to leave a copy of this warrant, together with such receipt, in the place where said property is found.

You are further commanded to execute this warrant within ten days from the date hereof, and forthwith to make return thereof to me with a report of the execution of this warrant, and a written inventory of the property seized hereunder by you.

Witness my hand and the seal of my office this 1 day of May, 1930.

Wm. H. Smathers, C. P. Judge.

Cross-examination.

By Mr. Pearse:

Q. Now, this warrant was issued by William H. Smathers, County Judge of Atlantic County, was it not?

A. Yes.

Q. And you took the affidavit before him?

A. I did.

Q. And you stated in that affidavit that you had cause and suspicion and did believe that certain liquors of foreign origin were in these premises?

A. Yes.

Q. Which is a dwelling house, is it not?

A. Yes.

Q. Occupied by Mr. Nathanson, the defendant?

[fol. 16] A. Yes.

Q. And what was the basis of that belief upon which you made your affidavit before the County Judge?

A. That was based upon information received from the office of the prohibition agent in charge in Atlantic City, Mr. Porter, and as a result of a conference that I had there with Mr. Porter and some of his agents.

Q. So you go to a prohibition agent's office and you get information about intoxicating liquors in these premises and you and customs agents make an affidavit that you suspicion and believe that there is liquor of foreign origin and get this search warrant from a County Judge, when you knew that the prohibition agent could not do it himself; is that right?

A. Why, I get a search warrant of this nature on such information, if it confirms my own beliefs and leads me to believe that the merchandise is there.

Q. Now, you got information from the Prohibition Department, did you not?

A. Yes, which confirmed my own beliefs.

Q. You got information from the Prohibition Department that there was intoxicating liquor in this dwelling house, did you not?

A. Yes, that there were intoxicating liquors there.

Q. Were you told by the prohibition agent that it was a private dwelling?

A. I was aware of that fact.

Q. You were aware of that fact?

A. Yes.

Q. Did the prohibition agent tell you why he did not go out and get a search warrant?

A. I do not believe we discussed that.

Q. What did you discuss?

A. We discussed how we were going to find where the big stores of liquor were that I was interested in finding, and how I was going to go about finding them.

[fol. 17] The Court: What were the ones you were interested in finding? What do you mean by that?

A. We were interested, your Honor, in locating this source of smuggled liquor.

The Court: Then it was with relation to smuggling that you were interested in?

A. Yes.

Q. And, of course, you discussed with the prohibition agents the fact that they could not under the prohibition act get a search warrant to search a private house, unless they had proof of sale. You discussed that with them, did you not?

A. It is probable, but I do not recall it. I cannot say for a certainty.

Q. Did the prohibition agents tell you why they did not go and take out a search warrant to search these premises instead of just giving you the information?

A. I do not know. I do not look a gift horse in the face.

The Court: Is there any difference in smuggled goods in your jurisdiction and those that are made in this country? Do you have anything to do with intoxicating liquors made in this country and stored here, if it is not smuggled?

A. No, sir; I have no jurisdiction then.

The Court: Did that have anything to do with your interest in it at all?

A. That had everything to do with my interest in it. I was only interested in it as liquor that had been smuggled.

Q. Why didn't you get the prohibition agent then to make the affidavit?

A. He is not entitled to make an affidavit for a customs search warrant, according to my knowledge and belief.

[fol. 18] Q. So, according to your instructions, you, as customs men, are the only kind of men who may make that affidavit?

A. Yes, the only kind who may look for smuggled goods. That is my understanding.

Q. What did this prohibition agent tell you upon which you say you based your belief which you say you had when you made this affidavit?

A. He told me that he and his men had seen stuff moved into there and seen it moved out, and, of course, I knew the Nathansons already.

Q. When did they say it was done?

A. Oh, on various days.

Q. Did they say that they saw the labels on any of the stuff that came out?

A. No, it was always on the way in. It was always in sacks.

Q. Did they see the sacks?

A. On at least one occasion.

Q. Did they tell you why they did not stop it as it was going in then?

A. No, they did not go into that.

Q. Did they give you a date when they saw sacks going in?

A. No.

Q. You do not know whether it was a month before or year before?

A. It was not a year before.

Q. Did they tell you?

A. Yes, it was inside of a very short period before we were having this conference.

Q. How short was the period?

A. Within a week or two.

Q. What did they say to you that they saw?

A. They saw this merchandise going in.

Q. What did they say they saw going in?

A. Sacks going in.

[fol. 19] Q. Did they say they had ever seen the contents of the sacks?

A. No.

Q. And did they say at what time of day or night it was they were moved in?

A. Yes, they said on the occasion they were speaking of they had seen the sacks going in at night.

Q. Did they tell you why they did not seize them as they were going in?

A. They did not know what was in the sacks.

Q. And that is all the information you had?

A. No, that is the information I received through Mr. Porter in charge of the prohibition office.

Q. What other information did you have, if any?

A. I also at that time had additional information from an informer.

Q. Who was the informer and what did he tell you?

A. It would be against Government interests to state.

Mr. Griggs: I object.

The Court: Objection sustained.

Q. Did you tell the County Judge that you had information from an informer when you made this affidavit?

A. Yes.

Q. Did you tell him the name of the informer?

A. No.

Q. Why not?

A. In the first place, he was not interested.

Q. What was the name of the informer?

Mr. Griggs: I object.

The Court: Objection sustained.

Mr. Pearse: Now, if the Court please, so far as the information against Jeremiah J. Nathanson is concerned, that is the facts relating to that information.

The Court: Under Information 1916b?

[fol. 20] MOTION TO SUPPRESS EVIDENCE, ETC.

Mr. Pearse: Yes, as it will be amended. I move to suppress the evidence and I move to set aside the search warrant on the ground that it was not issued upon probable cause and that the warrant was void. And that the customs agent, under that warrant, had no right of entry into those premises. It now appears that it was a dwelling house. He refused to give the source of his information

and what information he did give on the witness stand did not show probable cause.

The Court: The form of the affidavit for the warrant was practically the same as in the others?

Mr. Pearse: Yes.

The Court: No special reason is given as to the form.

Mr. Pearse: No.

The Court: The motion will be denied.

Mr. Pearse: Your Honor will allow me an exception?

The Court: Yes.

(Defendant's counsel prays an exception, which is hereby allowed and sealed accordingly.)

John Boyd Avis. (Sealed.)

MOTION FOR DIRECTED VERDICT

Mr. Pearse: I now move for direction of a verdict.

The Court: The motion to direct will be denied. Do both parties rest?

Mr. Pearse: Yes.

The Court: A verdict of conviction will be rendered in that case under the evidence as against J. J. Nathanson.

Mr. Griggs: Now, the Government expects to prove the alleged violation on the same date against Martin Nathanson at 41 N. Newton Avenue, Atlantic City, N. J.

[fol. 21] Mr. Pearse: The same facts will appear?

Mr. Griggs: The same facts.

Mr. Pearse: May we stipulate then that so far as that case is concerned that, instead of encumbering the Circuit Court of Appeals with a long record in the event that the last case should be decided against Jeremiah J. Nathanson I will bring Martin Nathanson in and he will plead guilty.

The Court: If otherwise it will be nolle prossed? I should think that would be a fair agreement.

Mr. Griggs: Perfectly, sir.

IN UNITED STATES DISTRICT COURT

PETITION FOR APPEAL—Filed March 23, 1932

Now comes the defendant, J. J. Nathanson, and says that on the twenty-third day of March, 1932, this Court entered

judgment herein against him, in which judgment and the proceedings prior thereto, certain errors were committed, to the prejudice of this defendant, all of which will in more detail appear from the assignment of errors which is filed with this petition.

Wherefore the defendant, J. J. Nathanson, prays than an appeal may be allowed to the United States Circuit Court of Appeals for the Third Circuit, for the correction of the errors so complained of and that a transcript of the record, proceedings and papers in this cause, upon which the judgment herein was rendered, duly authenticated, may be sent to the said United States Circuit Court of Appeals for the Third Circuit.

Dated March 23, 1932.

Frederic M. P. Pearse, Attorney of Defendant.

[fol. 22] IN UNITED STATES DISTRICT COURT

ORDER ALLOWING APPEAL—Filed March 23, 1932

This twenty-third day of March, 1932, comes the defendant, J. J. Nathanson, and files herein, and presents to the Court his petition, praying for the allowance of an appeal intended to be urged by him, praying also that a transcript of the record and proceedings and papers upon which the judgment herein was rendered, duly authenticated, may be sent to the United States Circuit Court of Appeals, for the Third Circuit, and that such other and further proceedings may be had as may be proper in the premises.

It is, on this twenty-third day of March, 1932, ordered that the appeal as prayed for be and the same is hereby allowed, and that a citation be issued; and it is further

Ordered that the defendant, J. J. Nathanson, be admitted to bail pending the hearing and determination by the said Circuit Court of Appeals of the issues arising under said appeal, upon his giving bond according to the law in the sum of $1000, which is to operate as a supersedeas bond.

John Boyd Avis, U. S. D. J.

[fol. 23] IN UNITED STATES DISTRICT COURT

ASSIGNMENT OF ERRORS—Filed March 23, 1932

Now comes J. J. Nathanson, defendant-appellant, and says that in the record, proceedings and judgment aforesaid, there is manifest error and for assignment thereof says that:

1. The Court erred in denying defendant's motion to suppress the evidence on the ground that such evidence was illegally obtained.

2. The Court erred in denying defendant's motion to set aside the search and suppress the evidence on the ground that there was no probable cause that a crime was being committed by the defendant.

3. The Court erred in pronouncing judgment against the defendant.

4. The judgment is contrary to law.

5. The Court erred in denying defendant's motion for a direction of a verdict.

6. The judgment is against the evidence.

7. The judgment is against the weight of the evidence.

Wherefore the defendant, J. J. Nathanson, prays that the judgment herein, for the errors aforesaid in the record and proceedings herein, may be reversed and annulled, and altogether held for nothing, and that the said defendant, J. J. Nathanson, may be restored to all things which he has lost by reason of said judgment.

Dated March 23, 1932.

Frederic M. P. Pearse, Attorney for Defendant

[fol. 24] Citation, in usual form, filed March 23, 1932, omitted in printing.

[fol. 25] IN UNITED STATES DISTRICT COURT

STIPULATION AS TO RECORD.

It is hereby stipulated and agreed by and between Harlan Besson, Esq., attorney for the plaintiff, and Frederic M. P. Pearse, attorney for the defendant, that the foregoing is a true transcript of the record of the said District Court in the above matter, as agreed upon by the parties.

Harlan Besson, United States Attorney, by John W. Griggs, Asst. U. S. Attorney. Frederic M. P. Pearse, Attorney for Defendant.

[fol. 26] Clerk's certificate to foregoing transcript omitted in printing.

[fols. 27 & 28] Minute entry of argument and submission, January 5, 1933, omitted in printing.

[fol. 29] IN UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT, OCTOBER TERM, 1932

No. 4896

J. J. NATHANSON, Defendant-Appellant,

v.

UNITED STATES OF AMERICA, Plaintiff-Appellee

Upon Appeal from the District Court of the United States for the District of New Jersey

Before Buffington, Davis, and Thompson, Circuit Judges

OPINION—Filed March 1, 1933

THOMPSON, Circuit Judge:

A criminal information was filed in the court below against the appellant, J. J. Nathanson, charging possession of intoxicating liquor in violation of section 25 of Title II

of the National Prohibition Act (27 U. S. C. A. 39). By stipulation, the charge against the appellant was tried before the court without a jury. Prior to trial the appellant's petition that liquor, which had been seized, be returned because of the alleged invalidity of the search warrant, under [fol. 30] authority of which seizure was effected, and that the evidence be suppressed, was denied. At the trial the application was renewed by motion and again denied, and a fine of five hundred dollars imposed upon the defendant. From that judgment this appeal was taken.

It is contended for the appellant that the court erred in admitting in evidence liquor obtained under an unlawful search and seizure. The search warrant was issued upon affidavit of a customs agent before a county judge of Atlantic County, New Jersey. The customs agent had received information from prohibition officials and from an unnamed informer that liquor of foreign origin was concealed upon the appellant's premises. The affidavit of the customs agent set forth that the affiant "has cause to suspect and does believe that certain merchandise, to wit: liquors of Canadian and other foreign origin, a more particular description of which cannot be given, upon which the duties have not been paid, or which has otherwise been brought into the United States contrary to law, and that said merchandise is now deposited and contained within the premises of J. J. Nathanson."

The appellant contends that the affidavit upon which the search warrant was issued showed no facts upon which to base a finding of probable cause; that the search warrant was therefore illegal; and that the use of the property so seized as evidence in a criminal prosecution amounted to a violation of the protection afforded by the Fourth Amendment to the Constitution which provides:

"The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

[fol. 31] Had this warrant issued under authority of the Prohibition Act, it would be invalid, since the affidavit was merely based upon cause to suspect and suspicion. It

issued, however, under the authority of the Tariff Act of 1930 (19 U. S. C. A. Supp. 1595) which reads:

"If any collector of customs or other officer or person authorized to make searches and seizures shall have cause to suspect the presence in any dwelling house, store, or other building or place of any merchandise, upon which the duties have not been paid, or which has been otherwise brought into the United States contrary to law, he may make application, under oath, to any justice of the peace, to any municipal, county, State or Federal judge, or to any United States commissioner, and shall thereupon be entitled to a warrant to enter such dwelling house in the daytime only, or such store or other place at night or by day, and to search for and seize such merchandise."

These provisions differ but slightly from those of the Act of July 31, 1789, 1 Stat. 43, section 24, which was enacted by Congress almost at the outset of our national existence. Searches for contraband smuggled into the United States in fraud of the revenue, upon affidavits setting forth an allegation of probable cause based upon suspicion, have been sustained from the earliest times. Locke v. United States, 11 U. S. 337. In that case Chief Justice Marshall said, on page 347:

"It is contended, that probable cause means prima facie evidence, or, in other words, such evidence as, in the absence of exculpatory proof, would justify condemnation. This argument has been very satisfactorily answered on the part of the United States, by the observation, that this would render the provision totally inoperative. It may be added, that the term 'probable cause,' according to its usual acceptation, means less than evidence which would [fol. 32] justify condemnation; and in all cases of seizure, has a fixed and well-known meaning. It imports a seizure made under circumstances which warrant suspicion. In this, its legal sense, the court must understand the term to have been used by congress."

In Boyd v. United States, 116 U. S. 616, 623, 624, the Supreme Court, noting the intendment of the Fourth Amendment in cases concerning stolen goods, or property in which the government has an interest, as in the instant case, said:

"The search for and seizure of stolen or forfeited goods, or goods liable to duties and concealed to avoid the payment thereof, are totally different things from a search for and seizure of a man's private books and papers for the purpose of obtaining information therein contained, or of using them as evidence against him. The two things differ toto coelo. In the one case, the government is entitled to the possession of the property; in the other it is not. The seizure of stolen goods is authorized by the common law; and the seizure of goods forfeited for a breach of the revenue laws, or concealed to avoid the duties payable on them, has been authorized by English statutes for at least two centuries past; and the like seizures have been authorized by our own revenue acts from the commencement of the government.

* * * * * * *

"But, when examined with care, it is manifest that there is a total unlikeness of these official acts and proceedings to that which is now under consideration. In the case of stolen goods, the owner from whom they were stolen is entitled to their possession; and in the case of excisable or dutiable articles, the government has an interest in them for the payment of the duties thereon, and until such duties are paid has a right to keep them under observation, or to pursue and drag them from concealment; * * *".

[fol. 33] In Gouled v. United States, 255 U. S. 298, 308, Mr. Justice Clarke said:

"The wording of the Fourth Amendment implies that search warrants were in familiar use when the Constitution was adopted and, plainly, that when issued 'upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized,' searches, and seizures made under them are to be regarded as not unreasonable, and therefore not prohibited by the Amendment. Searches and seizures are as constitutional under the Amendment when made under valid search warrants as they are unconstitutional, because unreasonable, when made without them—the permission of the Amendment has the same constitutional warrant as the prohibition has, and the definition of the former restrains the scope of the latter. All of this is abundantly recognized in the opinions of the Boyd and

Weeks Cases, supra, in which it is pointed out that at the time the Constitution was adopted stolen or forfeited property, or property liable to duties and concealed to avoid payment of them, excisable articles and books required by law to be kept with respect to them, counterfeit coin, burglars' tools and weapons, implements of gambling 'and many other things of like character' might be searched for in home or office and if found might be seized, under search warrants, lawfully applied for, issued and executed."

In the instant case the seizure was under the tariff laws. The government had a pecuniary interest in the smuggled goods. Following the reasoning in the cases cited, we conclude that that interest was sufficient to justify the issuance of the search warrant and that the search and seizure, based on the sworn complaint (phrased almost in the very words of the Tariff Act) and the warrant thereon, did not violate the constitutional rights of the defendant. [fol. 34] This court in Bookbinder v. United States, 287 Fed. 790, certiorari denied 262 U. S. 748, held that evidence obtained on a search warrant for violation of the customs laws is admissible in a prosecution for violation of the prohibition laws.

We find no error in the refusal of the learned District Judge to suppress the evidence secured by the search. The judgment is affirmed.

A true copy. Teste:

——— ———, Clerk of the United States Circuit Court of Appeals for the Third Circuit.

[fol. 35] IN UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT, OCTOBER TERM, 1932

No. 4896

J. J. NATHANSON, Appellant,

v.

UNITED STATES, Appellee

On appeal from the District Court of the United States for the District of New Jersey

JUDGMENT—Filed March 1, 1933

This cause came on to be heard on the transcript of record from the District Court of the United States, for the District of New Jersey, and was argued by counsel.

On consideration whereof, it is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be, and the same is hereby affirmed.

Philadelphia, March 1, 1933.

J. W. Thompson, Circuit Judge.

[fol. 36] Clerk's certificate to foregoing transcript omitted in printing.

[fol. 37] SUPREME COURT OF THE UNITED STATES

ORDER ALLOWING CERTIORARI—Filed May 29, 1933

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the Third Circuit is granted, and the case is assigned for argument on Monday, October 9 next, after the case heretofore assigned for that day.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

Endorsed on cover: File No. 37,612. U. S. Circuit Court of Appeals, Third Circuit. Term No. 39. J. J. Nathanson, petitioner, vs. The United States of America. Petition for a writ of certiorari and exhibit thereto. Filed April 26, 1933. File No. 39, O. T. 1933.

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Supreme Court of the United States

OCTOBER TERM, 1932.

No.

J. J. NATHANSON, PETITIONER,
(APPELLANT BELOW),

vs.

THE UNITED STATES OF AMERICA, RESPONDENT,
(APPELLEE BELOW).

PETITION FOR WRIT OF CERTIORARI.

To the Honorable the Supreme Court of the United States:

Your petitioner respectfully shows:

I.

Summary Statement of the Matter Involved.

1. A criminal information was filed on or about June 11, 1930, by the United States Attorney for the District of New Jersey, charging that the petitioner did knowingly, wilfully and unlawfully possess intoxicating liquor in violation of the National Prohibition Act (27 U. S. C. A. Sec. 40) (R. 4 to 9).

2. Before trial the petitioner moved to set aside the search warrant which had been issued, suppress the evidence obtained thereunder, and for a return of the property seized (R. 1). The motion was subsequently renewed at the trial (R. 11) and the court reserved decision until it had heard the testimony (R. 12).

3. The case then proceeded to trial before the court, a jury having been waived by the defendant.

4. At the end of the taking of testimony, the motion to set aside the search warrant and to suppress the evidence was renewed, and a motion was made for the direction of a verdict on the same grounds (R. 20).

5. The motions were denied, the petitioner found guilty of the crime charged (R. 20), and was subsequently sentenced to pay a fine of $500 (R. 3).

6. An appeal from the judgment was taken to the Circuit Court of Appeals for the Third Circuit which affirmed the judgment of the District Court on March 1, 1933 (R. 35).

II.

Question Presented.

The question here presented is whether or not a search warrant is valid, based upon an affidavit, which only sets forth that the affiant, a Customs officer, "has cause to suspect and does believe that certain merchandise, to wit: Certain liquors of foreign origin a more particular description of which cannot be given, upon which the duties have not been paid, or which has otherwise been brought into the United States contrary to law, and that said merchandise is now deposited and contained within the premises of J. J. Nathanson said premises being described as a 2 story frame dwelling located at 117 No. Bartram Ave., Atlantic City, N. J.," which premises are used as a private dwelling.

III.

Statutes Involved.

Constitution of the United States, Amendment IV:

> "The right of the people to be secure in their persons, houses, papers, and effects against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

Tariff Act of 1922, Sept. 21, 1922, c. 356, Title IV, §595, 42 Stat. 983; 19 U. S. C. A. 499:

> "*Search Warrants; Houses Within Ten Feet of Boundary.* If any collector of customs or other officer or person authorized to make searches and seizures shall have cause to suspect the presence in any dwelling house, store, or other building or place of any merchandise upon which the duties have not been paid, or which has been otherwise brought into the United States contrary to law, he may make application, under oath, to any justice of the peace, to any municipal, county, State, or Federal judge, or to any United States commissioner, and shall thereupon be entitled to a warrant to enter such dwelling house in the daytime only, or such store or other place at night or by day, and to search for and seize such merchandise. * * *"

Internal Revenue Act, R. S. §3462, 36 Stat. 1167; 26 U. S. C. A. 1195:

> "*Search Warrants.* The several judges of the district courts of the United States, and United States commissioners, may, within their respective jurisdictions, issue a search warrant, authorizing any internal-revenue officer to search any premises within the same, if such officer makes oath in writing that he has reason to believe, and does

believe, that a fraud upon the revenue has been or is being committed upon or by the use of the said premises."

Espionage Act, June 15, 1917, c. 30, Title XI, §3, 40 Stat. 228; 18 U. S. C. A. 613:

> "*Probable Cause and Affidavit.* A search warrant can not be issued but upon probable cause, supported by affidavit, naming or describing the person and particularly describing the property and the place to be searched."

National Prohibition Act, October 28, 1919, c. 85, Title II, §2, 41 Stat. 308; 27 U. S. C. A. 11:

> "* * * *Search Warrants.* * * * Section 591 of Title 18 is hereby made applicable in the enforcement of this chapter. Officers mentioned in said section 591 are authorized to issue search warrants under the limitations provided in sections 611 to 631, and 633 of Title 18."

IV.

Statement of the Case.

Francis Loughlin, a customs agent, testified at the trial of the case in the District Court, that he had received information from a prohibition agent who told him that he had seen "stuff" moved in and out of the residence of the petitioner (R. 16). This was the private dwelling of the petitioner (R. 15). The information was also to the effect that the merchandise "was in sacks," but the witness's informant did not know the contents of the sacks (R. 19). The witness also testified that he had received other information from an informer, but refused to divulge the name of his informer (R. 19). With this information in his possession he went to the County Judge of Atlantic County, New Jersey, and made an affidavit

> "that he has cause to suspect and does believe that certain merchandise to wit: Certain liquors of for-

eign origin a more particular description of which cannot be given, upon which the duties have not been paid, or which has otherwise been brought into the United States contrary to law, and that said merchandise is now deposited and contained within the premises of J. J. Nathanson, said premises being described as a 2 story frame dwelling located at 117 No. Bartram avenue, Atlantic City, N. J." (R. 14).

Upon this affidavit, and this affidavit alone (the contents of which are set forth in the search warrant) the County Judge issued the warrant to search the dwelling house of the petitioner (R. 14). The agent further testified that he himself made the affidavit to obtain the search warrant instead of the prohibition agent, because he understood that only a customs agent could make an affidavit for a customs search warrant and that only customs agents could look for smuggled goods (R. 17 and 18).

V.

Reasons for the Allowance of the Writ.

(1) The Circuit Court of Appeals followed its own decision in *Bookbinder* v. *United States* (287 Fed. 790, certiorari denied 262 U. S. 748), and held that a search warrant issued under the provisions of the Tariff Act on a sworn complaint, phrased in the language of the Tariff Act, is valid and based upon sufficient probable cause, as required by the Fourth Amendment to the Constitution.

The decisions in *Rice* v. *United States* (C. C. A. 1st, 24 Fed. (2d) 479); *United States* v. *Federal Mail Order Corporation* (C. C. A. 2nd, 47 Fed. (2d) 164), and *Wagner* v. *United States* (C. C. A. 8th, 8 Fed. (2d) 581) and other representative decisions cited in the argument, hold that the Fourth Amendment to the Constitution, relating to the issuance of search warrants, applies equally to warrants issued under the Espionage Act and under the Revenue

or Tariff Acts, and that an affidavit containing nothing more than does the affidavit in the instant case is insufficient to support a search warrant.

(2) The decision of the Circuit Court of Appeals conflicts with the principles laid down by this Court in *Grau* v. *United States* (No. 43 October Term, 1932, decided November 7, 1932, 53 Sup. Ct. Rep. 38) and in other decisions of this Court and involves an important question of federal law not yet decided by this Court.

WHEREFORE your petitioner prays that a writ of certiorari issue out of and under the seal of this honorable court, directed to the United States Circuit Court of Appeals for the Third Circuit, commanding the said Court to certify and send to this court for its review and determination on a day certain to be therein designated, a full and complete transcript of the record and of all the proceedings of the Circuit Court of Appeals in the said case entitled in that court: J. J. Nathanson defendant-appellant, *v.* United States of America, plaintiff-appellee, docket No. 4896, October Term, 1932, to the end that this case may be reviewed and determined by this Court as provided for by the statutes of the United States; and that the judgment herein of the Circuit Court of Appeals be reversed by this honorable court, and for such other further relief as to this Court may seem proper.

J. J. NATHANSON,

By FREDERIC M. P. PEARSE,
Attorney for and of Counsel with Petitioner.

Supreme Court of the United States

OCTOBER TERM, 1932.

No.

J. J. NATHANSON, PETITIONER,
(APPELLANT BELOW),

vs.

THE UNITED STATES OF AMERICA, RESPONDENT,
(APPELLEE BELOW).

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

I.

Opinion of the Court Below.

The opinion of the Circuit Court of Appeals is printed on page 29 of the record.

II.

Jurisdiction.

(1) The jurisdiction of this Court is invoked under Section 240 (A) of the Judicial Code, as amended by the Act of February 13, 1925, c. 299, 43 Stat. 938 (28 U. S. C. A. 347).

(2) The judgment of the Circuit Court of Appeals was entered March 1, 1933 (R. 35).

III.

Statement of the Case.

The facts in the case have already been related in the preceding petition under Title IV, page 4.

IV.

ARGUMENT.

(a) A sworn complaint upon which a search warrant is issued under the provisions of the Tariff Act (September 21, 1922, c. 356 Title IV, §595, 42 Stat. 983, 19 U. S. C. A. 499) must contain sufficient facts from which probable cause is shown for the issuance of such warrant.

The Circuit Court of Appeals in the Third Circuit held (R. 33) that as the warrant in the instant case was issued under the provisions of the Tariff Act, the statement in the affidavit was sufficient to support it. The court also stated in its opinion (R. 31) that "had this warrant issued under authority of the Prohibition Act, it would be invalid, since the affidavit was merely based upon cause to suspect and suspicion."

In reaching its conclusion, the learned court followed its own decision in *Bookbinder* v. *United States* (287 Fed. 790), in which case a similar affidavit and search warrant were involved, though not to search a private dwelling. In other words, the court holds that less is necessary to fulfill the requirements of the Fourth Amendment in the case of a search warrant issued by virtue of the Tariff Act than is necessary in a search warrant issued under the provisions of the National Prohibition Act.

In *United States* v. *Moore* (4 Fed. (2d) 600), the District Court for the Northern District of Maine in the First Circuit, likewise holds (citing the Bookbinder case, *supra*) that a warrant issued under the provisions of the

Tariff Act and based only on an affidavit similar to the one in the instant case, is not violative of the rights guaranteed by the Fourth Amendment to the Constitution.

The foregoing cases draw a distinction between search warrants issued under the Espionage Act to enforce the provisions of the National Prohibition Act and warrants issued to enforce the internal revenue and customs laws, and hold that the latter do not require the same degree of proof to support a search warrant as is required under the National Prohibition Act.

Going to the decisions of the Circuit Courts of Appeals in the First, Second and Eighth Circuits, we find a contrary view. These courts hold that the same test of probable cause must be applied to all search warrants whether they are issued to enforce the provisions of the National Prohibition Act or revenue and customs laws.

In *Rice, et al.* v. *United States* (24 Fed. (2d) 479), the Circuit Court of Appeals for the First Circuit had before it a search warrant issued under the provisions of the Internal Revenue Act (R. S. 3462, 26 U. S. C. A. 1195), which warrant was based upon an affidavit in the language of the statute that the affiant "has reason to believe and does believe" that a fraud is being committed upon the revenue. Upon such proof the court held that the warrant was insufficient to support the search warrant under the Fourth Amendment.

In *Wagner* v. *United States* (C. C. A. 8th, 8 Fed. (2d) 581), the court, in a learned and well considered opinion held that a search warrant issued under the internal revenue statutes is subject to the conditions contained in the Fourth Amendment to the Constitution, and that the provisions of those statutes are to be so construed as not to conflict therewith. In this latter case the affidavit was admittedly insufficient to support a search warrant under the National Prohibition Act. The court held that the

same test of probable cause must be applied to both and so set aside the warrant and suppressed the evidence.

In *United States* v. *Federal Mail Order Corporation* (47 Fed. (2d) 164), Judge Learned Hand of the Circuit Court of Appeals for the Second Circuit, in considering a search warrant issued under the same provision of the Tariff Act as the case at bar (19 U. S. C. A. 499), while finding that the affidavits in support of the warrant did contain sufficient proof of probable cause, nevertheless, before reaching that conclusion on the affidavits assumed that if the warrant had been based on "no more than the unsupported suspicion of a customs officer" it would have failed to meet the constitutional test of probable cause.

It is true that the Rice and Wagner cases, *supra*, were concerned with warrants issued under the internal revenue statutes, while the warrants in the case at bar and in the Federal Mail Order case, *supra*, were issued under the provisions of the Tariff Act. But the general principle is the same. The provisions in each statute are similar. Under the Tariff Act, if a customs officer has "cause to suspect" he may apply for a warrant to search. Under the Internal Revenue Act, if the revenue agent has "reason to believe" he too may apply for a warrant. Yet both must be construed in the light of the Fourth Amendment to the Constitution.

It is therefore clear that a well defined conflict exists between the decision in the instant case in the Third Circuit and the decisions in the other Circuit Courts herein referred to, and it is respectfully submitted that the question involved is of such importance that it should be settled by this Court.

(b) A mere allegation in the complaint or affidavit that the affiant "has cause to suspect and does believe * * *" etc. is not sufficient to support a finding of probable cause upon which a search warrant may issue.

The most recent case decided by this Court on the subject of search warrants is *Grau* v. *United States* (No. 43, October Term, 1932, decided November 7th, 1932, 53 Sup. Ct. Rep. 38), where the validity of a search warrant issued to enforce the provisions of the National Prohibition Act was considered. This Court held that a warrant may issue only upon evidence that would be competent to go before a jury. Tested by this standard the affidavit in the case at bar is clearly insufficient to support the warrant. No facts are set forth in the affidavit, merely an allegation of the affiant's suspicion, which is not evidence that would be competent to go before a jury.

The fact that the warrant in the Grau case, *supra*, was issued under the provisions of the National Prohibition Act is, we submit, immaterial. The principle is the same in each case. The statutes, whether enforcing the provisions of the revenue laws, or otherwise, cannot rise above the Constitution. This Court, in *Locke* v. *United States* (7 Cranch. 339, 3 L. Ed. 364, 11 U. S. 339), in *Boyd* v. *United States* (116 U. S. 616, 6 Sup. Ct. 524, 29 L. Ed. 746), in *Gouled* v. *United States* (255 U. S. 298, 41 Sup. Ct. 261, 65 L. Ed. 647), and in many other cases has defined the meaning of "probable cause" and the searches that are reasonable and those that are not.

The decision of the Third Circuit in the instant case is in conflict with the principles laid down in those cases, and for this and the other reasons herein set forth, the decision of the court below should be brought before this Court for review.

V.

Conclusion.

Your petitioner respectfully submits that a well defined conflict exists in the Circuit Courts of Appeals as to the effect of the Fourth Amendment to the Constitution on the issuance of search warrants under the provisions of the Tariff and Revenue laws, and that the decision of the Circuit Court of Appeals for the Third Circuit in the instant case deprives your petitioner of his rights as guaranteed by the Fourth Amendment to the Constitution of the United States.

Respectfully submitted,

FREDERIC M. P. PEARSE,
Attorney for and of Counsel with Petitioner.

FREDERIC M. P. PEARSE, JR.,
On the Brief.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1933.

No. 39.

J. J. NATHANSON, Petitioner,

vs.

THE UNITED STATES OF AMERICA.

BRIEF ON BEHALF OF PETITIONER.

Opinion Below.

The opinion of the Circuit Court of Appeals (R. 18-22) is reported in 63 Fed. (2d) 937.

Jurisdiction.

The judgment of the Circuit Court of Appeals was entered March 1st, 1933 (R. 22). The petition for certiorari was filed April 26, 1933, and the writ granted May 29, 1933 (53 S. Ct. 792). Petitioner invoked the jurisdiction of this Court under Section 240 (A) of the Judicial Code, as amended by the Act of February 13, 1925.

Question Presented.

Whether the trial court erred in refusing to exclude evidence, obtained under a warrant to search a dwelling house, issued under Section 595 of the Tariff Act of 1922, to a customs officer, upon the officer's sworn statement

that he had cause to suspect and did believe that imported liquors upon which the duties had not been paid, were deposited in the dwelling house to be searched.

Constitutional and Statutory Provisions Involved.

The Fourth Amendment to the Constitution of the United States, the pertinent provisions of the Act of 1789, of the Tariff Act of 1922, of the Internal Revenue Act and of the Espionage Act are printed in the Appendix.

Statement of Proceedings.

A criminal information was filed on or about June 11, 1930, charging that the petitioner did knowingly, wilfully and unlawfully possess intoxicating liquor in violation of Section 26 of the National Prohibition Act (R. 3 to 6). Before trial, the petitioner moved to set aside the search warrant which had been issued, to suppress the evidence obtained thereunder and for a return of the property seized (R. 1). The motion was subsequently renewed at the trial (R. 8), the court reserving decision on the motions until it had heard the testimony (R. 8).

The case then proceeded to trial before the court, a jury having been expressly waived by the defendant. At the close of the government's case the motion to set aside the search warrant and to suppress the evidence was renewed (R. 14). The motion was denied and an exception was prayed and allowed (R. 15). A motion for a directed verdict was also denied (R. 15). The court found petitioner guilty (R. 15) and sentenced him to pay a fine of $500.00 (R. 2).

Statement of Facts.

At the trial the government called as its sole witness one Francis Laughlin, a customs officer, who testified that prior to May 1st, 1930 he received information from a prohibition agent (R. 11), who told him that he and his men had seen "stuff" moved in and out of the private residence of the petitioner (R. 13). The information was also to the effect that the merchandise "was in sacks," but that the prohibition agent did not know what was in them (R. 13 and 14). The officer also testified that at the time that he applied for the search warrant he had additional information from an informer and had so told the county judge of Atlantic County to whom he applied for the search warrant (R. 14), but it does not appear that he told the judge what the information was or the name of the informer (R. 14). On the basis of the foregoing the officer made an affidavit

> "That he has cause to suspect and does believe that certain merchandise, to wit: certain liquors of foreign origin a more particular description of which cannot be given, upon which duties have not been paid, or which has otherwise been brought into the United States contrary to law, and that certain merchandise is now deposited and contained within the premises of J. J. Nathanson said premises being described as a two story frame dwelling located at 117 No. Bartram Avenue, Atlantic City, N. J." (R. 10).

and upon this affidavit the county judge issued a warrant to search the dwelling house of the petitioner (R. 9).

The only evidence produced by the government was the liquor seized, and the information obtained under the search warrant.

Summary of the Argument

The Circuit Court of Appeals decided that had "this warrant issued under authority of the Prohibition Act, it would be invalid, since the affidavit was merely based upon cause to suspect and suspicion" (R. 19). It further held that there is a distinction between a search for intoxicating liquor under the National Prohibition Act and merchandise under the Tariff Act.

We contend that by virtue of the Fourth Amendment to the Constitution there can be no such distinction. We further contend that the search warrant was void and the evidence obtained thereunder was inadmissible for the following reasons:

1. The affidavit upon which the same was based did not contain facts from which the magistrate could find probable cause that a fraud upon the revenue was being committed at petitioner's residence.

2. There was no competent evidence before the commissioner upon which the warrant could issue.

ARGUMENT.

I.

A search warrant under Section 595 of the Tariff Act of 1922 is void unless it is applied for and issued in compliance with the Fourth Amendment.

The principles enunciated in the Fourth Amendment to the Constitution are a codification of the law as it existed prior to the adoption of the Constitution. *Agnello* v. *United States* (C. C. A.), 290 Fed. 671, 675 (rev. on other grounds). The amendment was adopted in view of the long misuse of power in the matter of searches and seizures, both in England and the Colonies (*Byers* v. *United States*, 273 U. S. 28, 33, 47 S. Ct. 248, 71 L. Ed. 520), and

established the protection against unreasonable searches and seizures as a constitutional right which Congress itself cannot violate. (*Boyd* v. *United States*, 116 U. S. 616, 6 S. Ct. 524, 29 L. Ed. 746.)

Under the early common law the only search warrant known was that authorizing a search for stolen goods (*Commonwealth* v. *Hinds*, 145 Mass. 182), but by the time of the adoption of the Constitution the scope of search warrants had been extended. In *Gouled* v. *United States*, 255 U. S. 298, this Court held as follows (at 308):

> "The wording of the Fourth Amendment implies that search warrants were in familiar use when the Constitution was adopted and, plainly, that when issued 'upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized,' searches, and seizures made under them, are to be regarded as not unreasonable, and therefore not prohibited by the Amendment. Searches and seizures are as constitutional under the Amendment when made under valid search warrants as they are unconstitutional, because unreasonable, when made without them,—the permission of the Amendment has the same constitutional warrant as the prohibition has, and the definition of the former restrains the scope of the latter. All of this is abundantly recognized in the opinions of the Boyd and Weeks Cases, supra, in which it is pointed out that at the time the Constitution was adopted stolen or forfeited property, or property liable to duties and concealed to avoid payment of them, excisable articles and books required by law, to be kept with respect to them, counterfeit coin, burglars' tools and weapons, implements of gambling 'and many other things of like character' might be searched for in home or office and if found might be seized, under search warrants, lawfully applied for, issued and executed."

Although the use of search warrants was thus extended, nevertheless the common law rule that warrants may only

issue for those things in which the government has an interest, still prevails. For as Mr. Justice Clarke continues in *Gouled* v. *United States* (at 309):

> "Although search warrants have thus been used in many cases ever since the adoption of the Constitution, and although their use has been extended from time to time to meet new cases within the old rules, nevertheless it is clear that, at common law and as the result of the Boyd and Weeks Cases, supra, they may not be used as a means of gaining access to a man's house or office and papers solely for the purpose of making search to secure evidence to be used against him in a criminal or penal proceeding, but that they may be resorted to only when a primary right to such search and seizure may be found in the interest which the public or the complainant may have in the property to be seized, or in the right to the possession of it, or when a valid exercise of the police power renders possession of the property by the accused unlawful and provides that it may be taken. Boyd Case, pp. 623, 624."

A later pronouncement by this Court clearly adopting the doctrine of the Gouled case is found in *United States* v. *Lefkowitz, et al.*, 285 U. S. 452, 52 S. Ct. 420, 76 L. Ed. 877, where Mr. Justice Butler says (at 464):

> "Respondents' papers were wanted by the officers solely for use as evidence of crime of which respondents were accused or suspected. They could not lawfully be searched for and taken even under a search warrant issued upon ample evidence and precisely describing such things and disclosing exactly where they were. Gouled *v.* United States, 255 U. S. 298, 310, 41 S. Ct. 261, 65 L. Ed. 647."

And at p. 465 he continues as follows:

> "The decisions of this court distinguish searches of one's house, office, papers or effects merely to get evidence to convict him of crime from searches such as those made to find stolen goods for return to the owner, to take property that has been forfeited to the government, to discover property concealed to avoid payment of duties for which it is

> liable, and from searches such as those made for the seizure of counterfeit coins, burglars' tools, gambling paraphernalia, and illicit liquor in order to prevent the commission of crime." Citing the Boyd, Weeks, Gouled and Carroll cases.

It is thus clearly evident that a search for a man's papers to be used as evidence against him under a warrant amply supported by evidence showing probable cause, is unreasonable under the Fourth Amendment, and that therefore only searches for outlawed articles are reasonable and then only when the warrants for their seizure are "lawfully applied for, issued and executed."

It is contended by the government and determined by the Circuit Court of Appeals that a warrant may issue under the Tariff Act (*infra* p. 23) to search a dwelling upon the mere belief and suspicion of a customs officer that a fraud is being committed upon the revenue. This contention and finding claim support in the language of this court in *Boyd* v. *United States, supra,* where it is stated (at pp. 623, 624) that:

> "The search for and seizure of stolen or forfeited goods, or goods liable to duties and concealed to avoid the payment thereof, are totally different things from a search for and seizure of a man's private books and papers for the purpose of obtaining information therein contained, or of using them as evidence against him. The two things differ *toto coelo.* In the one case, the government is entitled to the possession of the property; in the other it is not. The seizure of stolen goods is authorized by the common law; and the seizure of goods forfeited for a breach of the revenue laws, or concealed to avoid the duties payable on them, has been authorized by English statutes for at least two centuries past; and the like seizures have been authorized by our own revenue acts from the commencement of the government."

The Court also relies on its previous decision in *Bookbinder* v. *United States,* 287 Fed. 790, certiorari denied 262 U. S. 748. It appears, however, that the question presented here was not urged in the petition for certiorari.

In reaching this conclusion, however, the Circuit Court of Appeals failed to distinguish between the *right* to search and the *means or method* to be used to obtain a warrant to search.

At one time there were doubts as to whether or not the right existed to issue a warrant authorizing the invasion of a man's premises to make a search for stolen goods, lottery tickets, gambling devices and the like. *Agnello* v. *United States* (C. C. A.), *supra,* at p. 617. However, as is pointed out in the *Boyd case, supra,* at p. 624, enabling statutes had been passed in England and by our own government authorizing the seizure of such articles as well as goods forfeited for a breach of the revenue laws. In fact the Act of 1789 (*infra* p. 23) was the first enactment by our government concerning seizure in aid of the revenue.

The lower court determined that, as the Act of 1922, under which the warrant in the instant case was issued, was based on the Act of 1789, passed by the Congress that proposed the first ten Amendments, the former is an exception to the Fourth Amendment and that therefore the right guaranteed to the people that "no warrant shall issue but upon probable cause supported by oath or affirmation" is of no avail to one whose house was invaded by a revenue officer armed with a search warrant obtained upon his affidavit that he suspected that a fraud was being committed upon the revenue, although it did not appear in his affidavit upon what facts he relied to reach this conclusion.

We fail to see how, in the light of the history of the Fourth Amendment and the evil which existed prior to

its adoption by the use of writs of assistance, such an exception can be valid. Such writs were issued

> "To the revenue officers, empowering them, in their discretion, to search suspected places for smuggled goods, and which James Otis pronounced 'the worst instrument of arbitrary power, the most destructive of English liberty and the fundamental principles of law, that ever was found in an English law book;' since they placed 'the liberty of every man in the hands of every petty officer.'" *Boyd* v. *United States* (*supra*), at p. 625.

The only difference between the warrant in this case and a writ of assistance is the necessity for a revenue officer to apply to a magistrate for a warrant. If a search warrant can thus be issued by a magistrate merely upon the suspicion of a petty officer who does not lay before the magistrate, under oath, the facts from which probable cause can be found, the application for the warrant is only an idle formality.

Can it be validly urged, in the light of the Fourth Amendment, that such practice is possible? We submit that if the doctrine announced by the Circuit Court of Appeals were affirmed by this Court, it would lie in the power of every petty officer to obtain a warrant to enter a man's private home upon mere suspicion or even none at all. The arbitrary "I suspect" of the officer, not subject to question or contest, but measured only by his own conscience, is an evil as vicious as the other abuses which are outlawed by the Fourth Amendment.

Moreover the lower court seeks to justify such an exception by holding that merchandise held in fraud of the revenue, being in the same category with counterfeit coin etc., and therefore forfeited to the government is such that it may be seized under a warrant which does not conform to the Fourth Amendment. Yet, under Section 173 of

the Criminal Code (18 U. S. C. A. 287), it is provided that:

> "The several judges * * * may, *upon proper oath or affirmation,* * * * issue a search warrant authorizing any marshal of the United States, * * * to enter any house, store, building, boat, or other place named in such warrant, *in which there shall appear probable cause for believing* that the manufacture of counterfeit money, * * * is being carried on or practiced, * * *." (Italics ours.)

We submit that statutes authorizing the issuance of warrants to search for contraband are only enabling statutes (Gouled and Boyd cases, *supra*) and that the method of obtaining the same, unless prescribed in conformity with the Fourth Amendment, is restricted by that Amendment.

The Congress, having the power to pass legislation condemning certain articles as contraband and forfeitable to the United States, enacted the Espionage Act of 1917 (*infra* p. 24), which we submit is a codification declaratory of the common law. See *Giles* v. *United States* (C. C. A. 1) 284 Fed. 208, where the court holds (at 212) that:

> "This careful codification of search warrant law leaves little or nothing for implication either as to the extent of the power or the method of its exercise. It authorizes search and seizure of stolen and embezzled property in conformity with a practice which probably goes back to Lord Coke's time."

cf. *United States* v. *Maresca* (D. C.), 226 Fed. 713.

That Act is taken from the New York Code of Criminal Procedure (Sec. 792), *People Ex Rel Robert Simpson Co.* v. *Kempner, et al.*, 208 N. Y. 16, 101 N. E. 794, 46 L. R. A. (N. S.) 970, Ann. Cas. 1914 D, 169, wherein it is stated:

> "A search warrant is an order in writing, in the name of the people, signed by a magistrate, directed to a peace officer, commanding him to search for personal property and bring it before the magis-

trate. Code of Criminal Procedure, §791. It may be issued upon one of three grounds: (1) When the property was stolen or embezzled; (2) when it was used as the means of committing a felony; (3) when it is in the possession of any person with the intent to use it as the means of committing a public offense. Code Criminal Procedure §792. In each of the cases last mentioned it is provided from whom the property may be taken under the warrant.

"A search warrant cannot be issued for any purpose, except as stated. Its legitimate use is, and always has been to aid in the detection and punishment of crime. As such it has been in common use since the days of Lord Coke. It was mentioned by him in the Institutes (Book 4 pp. 176, 177). Referring to search warrants, he says, 'for Justices of the Peace to make warrants upon surmises for breaking the house of any suspect to search for felons or stolen goods is against Magna Charta.'"

As we have already argued, the right to search is confined to those articles considered contraband at common law and others declared so by statute. This however does not dispense with lawful process in all cases. Mr. Justice Cardozo, then Associate Judge of the New York Court of Appeals, speaking for that Court in *People* v. *Defore*, 242 N. Y. 13, 150 N. E. 585, at 586, succinctly declares the necessity for such process as follows:

"The People stress the fact that the weapon was contraband, a nuisance subject to destruction. * * * It did not justify the search. There is no rule that homes may be ransacked without process to discover the fruits or the implements of crime. To make such inquisitions lawful, there must be the support of a search warrant issued upon probable cause. Search even then is 'confined under our statute (Code Cr. Proc. Sec. 792) to property stolen or embezzled, or used as the means of committing a felony, or held with the intent to use it as an instrument of crime' (citing cases). The warrant does not issue for things of evidential

> value merely (citing cases). What would be a wrong with a warrant is not innocent without one. To dispense with process in the pursuit of contraband is to dispense with it in the one case in which it may ever issue in the pursuit of anything. Means unlawful in their inception do not become lawful by relation when suspicion ripens into discovery."

In *People* v. *Chiagles,* 237 N. Y. 193, 142 N. E. 583, the same court held (at 584) that:

> "Search is then confined under our statute to property stolen or embezzled, or used as the means of committing a felony, or held with the intent to use it as an instrument of crime."

We respectfully submit that the issuance of a search warrant under the provisions of the Tariff Act of 1922 must conform to the requirements of the Fourth Amendment and is not excepted therefrom.

II.

The search warrant was void as it was issued on an affidavit which contained no facts on which to base a finding of probable cause.

A warrant is invalid unless it is issued on probable cause supported by oath or affirmation. The magistrate in determining the existence or lack of probable cause must exercise a judicial function which obviously cannot be delegated to the accuser. That such determination cannot be made in the absence of specific information is equally clear. Mr. Justice Bradley in *In Re Rule of Court,* 20 Fed. Case No. 12,126, 3 Woods. 502, while sitting as Circuit Judge, said:

> "After examination of the subject, we have come to the conclusion that such an affidavit does not meet the requirements of the constitution, which, by the fourth article of the amendments, declares that the right of the people to be secure in their persons, houses, papers and effects against unrea-

sonable searches and seizures shall not be violated; and that no warrants shall issue but upon probable cause, supported by oath or affirmation, describing the place to be searched and the persons to be seized. It is plain from this fundamental enunciation, as well as from the books of authority on criminal matters in the common law, that the probable cause referred to, and which must be supported by oath or affirmation, must be submitted to the committing magistrate himself, and not merely to an official accuser, so that he, the magistrate, may exercise his own judgment on the sufficiency of the ground shown for believing the accused person guilty; and this ground must amount to a probable cause of belief or suspicion of the party's guilt. In other words, the magistrate ought to have before him the oath of the real accuser, presented either in the form of an affidavit, or taken down by himself by personal examination, exhibiting the facts on which the charge is based and on which the belief or suspicion of guilt is founded. The magistrate can then judge for himself, and not trust to the judgment of another, whether sufficient and probable cause exists for issuing a warrant. It is possible that by exercising this degree of caution, some guilty persons may escape public prosecution, but it is better that some guilty one should escape than that many innocent persons should be subjected to the expense and disgrace attendant upon being arrested upon a criminal charge, and this was undoubtedly the beneficent reason upon which the constitutional provision referred to was founded."

The wisdom of placing the matter of issuing search warrants in the hands of persons learned in the law has been recognized since before the adoption of the Constitution, and has received approbation as recently as 1932 by this Court in *United States* v. *Lefkowitz, et al., supra*, where Mr. Justice Butler said (at p. 464):

"The authority of officers to search one's house or place of business contemporaneously with his lawful arrest therein upon a valid warrant of arrest

> certainly is not greater than that conferred by a search warrant issued upon adequate proof and sufficiently describing the premises and the things sought to be obtained. Indeed, the informed and deliberate determinations of magistrates empowered to issue warrants as to what searches and seizures are permissible under the Constitution are to be preferred over the hurried action of officers and others who may happen to make arrests. Security against unlawful searches is more likely to be attained by resort to search warrants than by reliance upon the caution and sagacity of petty officers while acting under the excitement that attends the capture of persons accused of crime. United States *v.* Kirschenblatt (C. C. A.) 16 F. (2d) 202, 203, 51 A. L. R. 416; Go-Bart Co. *v.* United States, *supra,* 282 U. S. 358, 51 S. Ct. 153, 75 L. Ed. 374."

In *Weeks* v. *United States,* 232 U. S. 383, where papers were seized by the United States Marshal from the defendant's home without a warrant, this Court said (at p. 393):

> "Under such circumstances, *without sworn information* and particular description, not even an order of court would have justified such procedure, much less was it within the authority of the United States Marshal to thus invade the house and privacy of the accused." (Italics ours.)

In *Byers* v. *United States, supra,* p. 4, a case involving a warrant issued on an affidavit almost identical with the one in the instant case, it was said (at p. 29):

> "The information upon which the search warrant was issued states only that affiant 'has good reason to believe and does believe the defendant has in his possession' such intoxicating liquors, instruments and materials. The warrant clearly is bad if tested by the Fourth Amendment and the laws of the United States. C. 30, Title XI, §§3-6, 40 Stat. 217, 228-229; c. 85, Title II, §2, 41 Stat. 305, 308. See Ripper *v.* United States, 178 Fed. 24, 26; United

States v. Borkowski, 268 Fed. 408, 410-411; United States *v.* Kelly, 277 Fed. 485, 486-489."

We also call attention to the following cases which hold that warrants based on affiant's conclusions alone are void: *Giles* v. *United States* (C. C. A.), 284 Fed. 214; *United States* v. *Harnich* (D. C.), 289 Fed. 256; *Veeder* v. *United States* (C. C. A.), 252 Fed. 414.

This Court in *Go-Bart Importing Co.* v. *United States*, 282 U. S. 344, 51 S. Ct. Rep. 153, in reversing a conviction obtained on information procured under a purported search warrant held (at page 357), that the second clause of the Fourth Amendment

> "* * * prevents the issue of warrants on loose, vague, or doubtful bases of fact. It emphasizes the purpose to protect against all general searches. Since before the creation of our government, such searches have been deemed obnoxious to fundamental principles of liberty. They are denounced in the constitutions or statutes of every State in the Union. Agnello *v.* United States, 269 U. S. 20, 33, 46 S. Ct. 4, 70 L. Ed. 145, 51 A. L. R. 409. The need of protection against them is attested alike by history and present conditions. The Amendment is to be liberally construed and all owe the duty of vigilance for its effective enforcement lest there shall be impairment of the rights for the protection of which it was adopted."

To summarize our contentions we quote from Judge Cooley's Constitutional Limitations (7th Ed.) page 427:

> "The history of this controversy (searches and seizures) should be read in connection with that in America immediately previous to the American Revolution, in regard to writs of assistance issued by the courts to the revenue officers, empowering them, in their discretion, to search suspected places for smuggled goods, and which Otis pronounced 'the worst instrument of arbitrary power, the most destructive of English liberty and the fundamental principles of law, that ever was found in an English

law book'; since they placed 'the liberty of every man in the hands of every petty officer.' All of these matters are now a long way in the past; but it has not been deemed unwise to repeat in the State constitutions, as well as in the Constitution of the United States, the principles already settled in the common law upon this vital point in civil liberty. * * *

"In the first place, they (search warrants) are only to be granted in the cases expressly authorized by law; and not generally in such cases until after a showing made before a judicial officer, under oath, that a crime has been committed, and that the party complaining has reasonable cause to suspect that the offender, or the property which was the subject or the instrument of the crime, is concealed in some specified house or place. *And the law, in requiring a showing of reasonable cause for suspicion, intends that evidence shall be given of such facts as shall satisfy the magistrate that the suspicion is well founded; for the suspicion itself is no ground for the warrant except as the facts justify it.*" (Italics ours.)

III.

Decisions under search warrant sections of Internal Revenue and Tariff Acts.

There are very few decisions construing Section 595 of the Tariff Act of 1922 (*infra* p. 23). However, a similar provision of the Internal Revenue Act (*infra* p. 24) has been considered on numerous occasions. This provision authorizes the issuance of warrants if an Internal Revenue officer "make oath in writing that he has reason to believe, and does believe, that a fraud upon the revenue has been or is being committed upon or by the use of the said premises." The various district courts and circuit courts of appeal, in construing this statute, uniformly have held that an affidavit merely tracking the statute and not setting forth facts from which probable cause can be found, is

insufficient as it is inconsistent with and contrary to the spirit of the Fourth Amendment.

The then Attorney General of the United States, considering the statute, in 24 Op. Attys. Gen. 685, decided that:

> "The section providing for the issue of these search warrants does not state all of that which must be stated in the application therefor. The Fourth Amendment to the Constitution provides that 'no warrant shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the person or things to be seized.'"

In the case of *Wagner* v. *United States* (C. C. A.), 8 Fed. (2d) 581, the Court, in declaring void a search warrant based on an affidavit of suspicion, unsupported by facts, said at page 585:

> "Counsel for defendant in error seek to support the proposition that section 3462 is not subject to the conditions contained in the Fourth Amendment, by pointing out that a statute similar to section 3462 was passed by the First Congress of the United States prior to the adoption of the Fourth Amendment. There are several answers to such a contention: (1) Whatever the practice may have been under the old statute (Act of July 31, 1789, 1 Stat. 43, c. 5, Sec. 24), yet section 3462, having been passed subsequent to the adoption of the Fourth Amendment is presumptively subject thereto. (2) The wording of the Act of July 31, 1789, differs materially from that of section 3462, and in our opinion is not open to the construction placed upon it by counsel. (3) No authority is cited to the effect that even under the old statute of 1789 an affidavit such as is involved in the instant case was sufficient. (4) The principles enunciated in the Fourth Amendment were firmly imbedded in the common law prior to the adoption of the Fourth Amendment of the United States Constitution, and the statute of July 31, 1789, was doubtless con-

> strued and intended to be construed in accordance with those common-law principles. Cooley on Constitutional Limitations (7th Ed.) pp. 428, 429; Boyd *v.* United States, 116 U. S. 616, 635, 6 S. Ct. 524, 29 L. Ed. 746; Weeks *v.* United States, 232 U. S. 383, 390, 391, 34 S. Ct. 341, 58 L. Ed. 652, L. R. A. 1915B, 834, Ann. Cas. 1915C, 1177."

This case is cited with approval by this Court in *Grau* v. *United States,* to which we later refer.

The following cases uniformly hold that a warrant under the Internal Revenue statute may issue only upon an affidavit reciting facts showing probable cause. *Ripper* v. *United States,* 178 Fed. 24, 26 (C. C. A. 8th); *Woods* v. *United States,* 279 Fed. 706, 709, 710 (C. C. A. 4th); *Schencks* v. *United States,* 2 Fed. (2d) 185, 187 (App. D. C.); *United States* v. *Rykowski,* 267 Fed. 866, 868, 869 (S. D. Ohio); *United States* v. *Pitotto,* 267 Fed. 603, 604 (Ore.); *United States* v. *Armstrong,* 275 Fed. 506, 508 (S. D. Fla.). See also *United States* v. *Swan,* 15 Fed. (2d) 598, 599 (N. D. Cal.).

We respectfully submit that as the mischief aimed at by both statutes is similar, the Tariff Act must receive the same construction.

Among the cases which hold that an affidavit under the Tariff Act must contain more than an affirmation of suspicion, we find *United States* v. *Federal Mail Order Corporation* (C. C. A. 2), 47 Fed. (2d) 164, in which Judge Learned Hand, though deciding (p. 165) that

> "* * * the supporting affidavits proved beyond any fair doubt that the defendants had been smuggling Swiss watches."

stated that:

> "The warrant was issued under section 499 of title 19, of the United States Code (19 U. S. C. A. sec. 499), which had its origin in section 24 of chapter 5 of laws passed by the First Congress

(1 St. L. p. 43). This provided that if a customs officer 'have cause to suspect a concealment' of goods subject to duty 'in any particular dwelling house, store, building or other place' he might, upon procuring a warrant, search for and seize them; it was enacted by the same Congress which at the time had before it the resolution that put the Fourth Amendment before the states. Were a practice shown antedating 1789, by which it was customary to seize smuggled goods upon a showing of no more than the unsupported suspicion of a customs officer, it may well be that this should be recognized as an exception to the amendment (Den ex dem. Murray *v.* Hoboken Land Co., 18 How. 272, 15 L. Ed. 372; Boyd v. U. S., 116 U. S. 616, 623, 6 S. Ct. 524, 29 L. Ed. 746; Ownbey *v.* Morgan, 256 U. S. 94, 41 S. Ct. 433, 65 L. Ed. 837, 17 A. L. R. 873; Corn Exchange Bank *v.* Coler, 280 U. S. 218, 50 S. Ct. 94, 74 L. Ed. 378); but, as we are not advised of any such (Wagner *v.* U. S., 8 F. (2d) 581, 585 C. C. A. 8), we cannot see how that question can here be pertinent, and may assume arguendo that more was necessary (Rice *v.* U. S., 24 F. (2d) 479 C. C. A. 1); United States *v.* Lai Chow (D. C.), 298 F. 652)."

See also *In re Chin K. Shue* (D. C.), 199 Fed. 282; *Pappas* v. *Lufkin* (D. C.), 17 Fed. (2d) 988, and *United States* v. *Clark* (D. C.), 18 Fed. (2d) 442, to which latter case we refer for the many citations therein found.

IV.

The evidence before the Magistrate issuing the warrant must be competent and must appear in the supporting affidavits.

This Court recently, in the case of *Grau* v. *United States,* 287 U. S. 124, 77 L. Ed. 68, 53 Sup. Ct. Rep. 38, decided (p. 40) that

> "A search warrant may issue only upon evidence which would be competent in the trial of the offense

> before a jury (Giles *v.* United States (C. C. A.), 284 F. 208; Wagner *v.* United States (C. C. A.), 8 F. (2d) 581), and would lead a man of prudence and caution to believe that the offense has been committed (Steele *v.* United States, 267 U. S. 498, 504; 45 S. Ct. 414, 69 L. Ed. 757). Tested by these standards, the affidavit was insufficient. While a dwelling used as a manufactory or headquarters for merchandising may well be and doubtless often is the place of sale, its use for those purposes is not alone probable cause for believing that actual sales are there made."

While it is true that the warrant in the Grau case was issued under the Espionage Act we contend that the same test must be applied to warrants issued under any other statute which authorizes them.

In the Wagner case, *supra,* the affidavit was made by an Internal Revenue Agent, who averred that he made it "upon the personal knowledge of affiant by reason of having in his possession" an affidavit made by another (naming him) from which he learned certain facts. Commenting upon this, this Court said (p. 583):

> "This, of course, was mere hearsay. Moreover, it is not clear what meaning the words 'which are known to be untax-paid' are intended to convey; whether that the status 'untax-paid' was known to Beazell, who makes the affidavit, or known to Reich, whose affidavit is referred to, or known to defendant, who is said to have had the conversation with Reich. In any event, the words quoted state, not a fact, but a mere conclusion."

It appears from the testimony in the instant case that when the customs agent made his affidavit before the Common Pleas Judge, he told the Judge that he had obtained his information from an informer but did not name him (R. 14). He also stated that the other information he received, upon which he made the affidavit was information from a prohibition agent. Undoubtedly this

is a worse brand of hearsay than that in the Wagner case, as the information there consisted of a sworn statement.

In *Giles* v. *United States, supra* p. 10 (cited with approval by this Court in the Grau case), the Court said as follows (p. 214):

> "No lawyer would have suggested and no judge would have permitted, Lordan, testifying as a witness before a jury, to say that Giles was violating the National Prohibition Act by having illegal possession of intoxicating liquor at his drug store. He would have been required to state what he saw, or heard, or smelled, or tasted; that is, to give evidence on which the jury, under instructions of the court, could determine both as to the possession of liquor, as to whether it was intoxicating liquor, and as to whether possession of it was legal or illegal. The fact that Lordan's affidavit was not, in form, on information and belief, and that he bravely swore that Giles had illegal possession of intoxicating liquor, does not make his statement legal evidence of the facts. It is not enough that the form of this affidavit leaves it possible that the affiant might have personal knowledge as to the possession of intoxicating liquor and as to facts tending to show that such possession was illegal. It should have affirmatively appeared that he had personal knowledge of facts competent for a jury to consider, and the facts, and not his conclusion from the facts, should have been before the commissioner. Such is the plain requirement of section 5, supra."

In addition to the foregoing, we call attention to a recent case in the Ninth Circuit (*Poldo* v. *United States* (C. C. A.), 55 Fed. (2d) 866) where the court (at p. 868) said:

> "The authorities are clear that the affidavit must be self-sufficient, and cannot be bolstered up by oral testimony. In United States *v.* Casino (286 Fed. 976), Judge Learned Hand said: 'For a similar reason it is not material that the other evidence is absent, which was before the commissioner and which may have induced him to deny

quashal of the warrant. While under section 16 he must decide after hearing whether on all the facts there were reasonable grounds for the warrant, that does not dispense with the necessity for allegation in the affidavits themselves, which, if true, show a self-subsisting ground for the issuance of the warrant. * * * In this respect the affidavits are like pleadings. Other corroborative evidence, no doubt, is admissible for the United States, but the original allegations must in the end be supported. Hence, if those allegations on their face be inadequate, the warrant can by no possibility be legal.'"

V.

CONCLUSION.

We submit that the lower court erred in admitting in evidence over objection and exception the articles seized under the warrant and that the conviction should be reversed.

Respectfully submittd,

FREDERIC M. P. PEARSE,
Attorney for and of Counsel
with Petitioner.

MAX MEHLER,
On the Brief.

APPENDIX.

Constitution of the United States, Amendment IV:

> "The right of the people to be secure in their persons, houses, papers, and effects against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

Act of July 31, 1789, Sec. 24, 1 Stat. 29, 43:

> "That every collector, naval officer and surveyor, or other person specially appointed by either of them for that purpose, shall have full power and authority, to enter any ship or vessel, in which they shall have reason to suspect any goods, wares or merchandise subject to duty shall be concealed; and therein to search for, seize, and secure any such goods, wares or merchandise; and if they shall have cause to suspect a concealment thereof, in any particular dwelling-house, store, building, or other place, they or either of them shall, upon application on oath or affirmation to any justice of the peace, be entitled to a warrant to enter such house, store, or other place (in the day time only) and there to search for such goods, and if any shall be found, to seize and secure the same for trial; and all such goods, wares, and merchandise, on which the duties shall not have been paid or secured, shall be forfeited."

Tariff Act of 1922, Sept. 21, 1922, c. 356, Title IV, §595, 42 Stat. 983; 19 U. S. C. A. 499:

> "*Search-Warrants; Houses Within Ten Feet of Boundary.* If any collector of customs or other officer or person authorized to make searches and seizures shall have cause to suspect the presence in any dwelling house, store, or other building or place of any merchandise upon which the duties have not been paid, or which has been otherwise brought into the United States contrary to law, he may make application, under oath, to any justice

of the peace, to any municipal, county, State, or Federal judge, or to any United States commissioner, and shall thereupon be entitled to a warrant to enter such dwelling house in the daytime only, or such store or other place at night or by day, and to search for and seize such merchandise. * * *"

Internal Revenue Act, R. S. §3462, 36 Stat. 1167; 26 U. S. C. A. 1195:

"*Search Warrants.* The several judges of the district courts of the United States, and United States commissioners, may, within their respective jurisdictions, issue a search warrant, authorizing any internal-revenue officer to search any premises within the same, if such officer makes oath in writing that he has reason to believe, and does believe, that fraud upon the revenue has been or is being committed upon or by the use of the said premises."

Espionage Act, June 15, 1917, c. 30, Title XI, §2, 3, 40 Stat. 228; 18 U. S. C. A. 612, 613.

"§612. GROUNDS FOR ISSUE. A search warrant may be issued under this chapter upon either of the following grounds:

"1. When the property was stolen or embezzled in violation of a law of the United States; in which case it may be taken on the warrant from any house or other place in which it is concealed, or from the possession of the person by whom it was stolen or embezzled, or from any person in whose possession it may be.

"2. When the property was used as the means of committing a felony; in which case it may be taken on the warrant from any house or other place in which it is concealed, or from the possession of the person by whom it was used in the commission of the offense, or from any person in whose possession it may be."

"§613. PROBABLE CAUSE AND AFFIDAVIT. A search warrant can not be issued but upon probable cause, supported by affidavit, naming or describing the person and particularly describing the property and the place to be searched."

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In the Supreme Court of the United States

OCTOBER TERM, 1932

No. 915

J. J. NATHANSON, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT

MEMORANDUM FOR THE UNITED STATES

OPINIONS BELOW

No opinion was rendered by the District Court. The opinion of the Circuit Court of Appeals (R. 29–34) has not yet been reported.

JURISDICTION

The judgment of the Circuit Court of Appeals was entered March 1, 1933 (R. 35). The petition for certiorari was filed April 26, 1933. The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTION PRESENTED

Whether the trial court erred in refusing to exclude evidence obtained upon a warrant to search a dwelling house issued, under Section 595 of the Tariff Act of 1922, to a customs officer upon the officer's sworn statement that he had cause to suspect and did believe that imported liquors upon which the duties had not been paid were deposited in the dwelling house to be searched.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fourth Amendment provides:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

Section 595 of the Tariff Act of 1922, c. 356, Title IV, 42 Stat. 858, 983 (U.S.C., Title 19, Sec. 499), provided, so far as material here:

> WARRANT.—If any collector of customs or other officer or person authorized to make searches and seizures shall have cause to suspect the presence in any dwelling house, store, or other building or place of any merchandise upon which the duties have not been paid, or which has been otherwise brought into the United States contrary to law, he

> may make application, under oath, to any justice of the peace, to any municipal, county, State, or Federal judge, or to any United States commissioner, and shall thereupon be entitled to a warrant to enter such dwelling house in the daytime only, or such store or other place at night or by day, and to search for and seize such merchandise * * *.

STATEMENT

Petitioner was charged in an information filed in the District Court of the United States for the District of New Jersey with the possession of whiskey and other intoxicating liquor in violation of the National Prohibition Act (R. 4–5). According to the docket entries appearing in the record, a motion to suppress evidence was made and denied before trial (R. 1–2). At the trial this motion was renewed but decision was reserved pending the "coming in of the testimony in the case" (R. 11–12). At the close of the Government's case petitioner again moved to suppress the evidence and to set aside the search warrant upon which it had been obtained on the ground that the warrant had issued without probable cause. The motion was denied and an exception was prayed and allowed (R. 20). A motion for a directed verdict was also denied (R. 20). The defense having rested without introducing testimony, the court, acting by consent without a jury (R. 2), found petitioner guilty (R. 20), and sentenced him to pay a fine of $500 (R. 3).

Upon appeal to the Circuit Court of Appeals the judgment was affirmed (R. 35).

At the trial the Government called as its sole witness one Laughlin, a customs officer, who testified in substance as follows: On May 1, 1930, the witness visited the premises in question, located in Atlantic City, New Jersey, pursuant to a search warrant which he had obtained from a Judge of Common Pleas of Atlantic County. The witness found no one "in" when he arrived at the house. After waiting "a considerable length of time," he went around the house and, looking through a window into the cellar, observed a quantity of marine equipment and "a few bottles of liquor." He thereupon entered the cellar and found therein the liquors which were listed on the back of the warrant.[1] While the

[1] In an affidavit accompanying the criminal information the customs officer stated that upon inspecting the premises from the outside he found that "each of the cellar windows was backed up by a heavy wooden shutter secured by a crossbar," that "finding one of the cellar windows slightly open and the wooden shutter behind it about 2" down from the top, I looked through the opening and observed a quantity of marine equipment, * * * several casks and some liquor in bundles," that "having observed this liquor, I removed the shutter and made an entrance into the cellar followed by Inspector Boeger," that in addition to a large quantity of liquors of foreign origin he found "a complete cutting plant * * * consisting of alcohol in 5 gal. tins, distilled water, extracts, such as oil of fennel, oil of juniper, etc., as well as labels, corks, seals and counterfeit revenue stamps," and that this latter material was turned over to agents of the prohibition service (R. 7–9).

search was in progress, but after the liquors had been found, a lady who said that she was an occupant of the house, and who the witness believed was Mrs. Nathanson, appeared and the witness handed her the warrant with a receipt for the liquors on the back thereof (R. 11–13).

Upon cross-examination Laughlin testified that the premises searched consisted of a dwelling house occupied by the petitioner; that in the affidavit made by the witness before the county judge he had stated that he "had cause and suspicion and did believe" that liquors of foreign origin were contained in the premises; that the witness' belief was based upon information received by him from the prohibition agent in charge at Atlantic City, who told the witness that he and his men had recently seen sacks taken into the house at night, but did not know what was in them. The witness further stated that at the time he applied for the search warrant he had additional information from an informer and had so told the county judge. He was thereupon asked the name of the informer, but an objection by the Government to this question was sustained (R. 15–19).

While the affidavit upon which the search warrant issued does not appear in the record, the following statement appears in the opinion of the Circuit Court of Appeals (R. 30):

> The affidavit of the customs agent set forth that the affiant "has cause to suspect

> and does believe that certain merchandise, to wit: liquors of Canadian and other foreign origin, a more particular description of which cannot be given, upon which the duties have not been paid, or which has otherwise been brought into the United States contrary to law, and that said merchandise is now deposited and contained within the premises of J. J. Nathanson."

And the search warrant recited (R. 14):

> Whereas said Francis B. Laughlin has stated under his oath that he has cause to suspect and does believe that certain merchandise, to wit: Certain liquors of foreign origin a more particular description of which cannot be given, upon which the duties have not been paid, or which has otherwise been brought into the United States contrary to law, and that said merchandise is now deposited and contained within the premises of J. J. Nathanson said premises being described as a 2 story frame dwelling located at 117 No. Bartram Ave., Atlantic City, N.J.; and
>
> Whereas said Francis B. Laughlin has requested that a warrant issue to him, authorizing him to enter said premises and search for and seize said merchandise:
>
> NOW THEREFORE, YOU ARE COMMANDED, in the name and by the authority of the President of the United States, to enter and search the premises hereinbefore described * * *.

See also R. 7.

ARGUMENT

If the question presented by the petition for certiorari was preserved for appellate review by a proper bill of exceptions,[2] we do not oppose the issuance of the writ.

While the affidavit upon which the search warrant in the instant case was based does not appear in the record, it is stated in the opinion of the Circuit Court of Appeals (R. 30) that the affidavit of the customs officer averred that he "has cause to suspect and does believe" that certain merchandise of foreign origin upon which the duties had not been paid or which had otherwise been brought into the United States contrary to law, "is now deposited and contained" in the dwelling house of the petitioner[3] (R. 14). While apparently the language of the affidavit follows that of Section 595 of the Tariff Act of 1922 (*supra*, p. 2), under which the warrant issued there may be doubt whether the warrant satisfied the requirements of the Fourth Amendment (*supra*, p. 2). It contains no finding as to the existence of probable cause, and was based upon an affidavit which evidently recited no facts justifying the making of any such finding. See

[2] See Appendix, *infra*, pp. 11–13.

[3] A similar recital is found in the warrant (R. 14). There is nothing in the record to indicate that the affidavit contained any further allegations with respect to the issue of probable cause and the case appears to have been tried by both courts below upon the theory that the affidavit contained no facts showing the basis of the officer's suspicion and belief.

Byars v. *United States*, 273 U.S. 28, 29; *Grau* v. *United States*, 287 U.S. 124, 127.

The court below held, in effect, that an exception to the usual rule as to probable cause exists in the case of warrants to search for smuggled goods. It said that the Government has a pecuniary interest in such goods and that it has been recognized by certain decisions of this Court that ever since the beginning of the Government searches for contraband smuggled into the United States in fraud of the revenue may be made "upon affidavits setting forth an allegation of probable cause based upon suspicion" (R. 31). We have examined the decisions of this Court to which the court below refers (*Locke* v. *United States*, 7 Cranch 339; *Boyd* v. *United States*, 116 U.S. 616; and *Gouled* v. *United States*, 255 U.S. 298), but we do not read those cases as holding that the requirements of the Fourth Amendment do not apply to applications for warrants to search for smuggled contraband. However, the decision of the court below is supported by its previous decision in *Bookbinder* v. *United States*, 287 Fed. 790, certiorari denied, 262 U.S. 748,[4] as well as by the cases of *United States* v. *Moore*, 4 F. (2d) 600 (Me.), and *In Re 14 East Seventeenth Street, etc.*, 57 F. (2d) 212 (S.D.N.Y.). These decisions are opposed by *United States* v. *Lai Chew*, 298 Fed. 652 (N.D. Cal.), and *United*

[4] Examination of the petition for certiorari in the *Bookbinder case* discloses that the question here presented was not urged.

States v. *Clark*, 18 F. (2d) 442 (Mont.). See also *In re Chin K. Shue*, 199 Fed. 282 (Mass.); *Pappas* v. *Lufkin*, 17 F. (2d) 988 (Mass.); *United States* v. *Federal Mail Order Corporation*, 47 F. (2d) 164 (C.C.A. 2d).

It should also be pointed out that under Section 3462 of the Revised Statutes (U.S.C., Title 26, Sec. 1195), which provides for the issuance of search warrants to any internal-revenue officer "if such officer makes oath in writing that he has reason to believe, and does believe, that a fraud upon the revenue has been or is being committed upon or by the use of the * * * premises", it has been uniformly held that such a warrant may issue only upon an affidavit reciting facts showing probable cause. *Ripper* v. *United States*, 178 Fed. 24, 26 (C.C.A. 8th); *Woods* v. *United States*, 279 Fed. 706, 709–710 (C.C.A. 4th); *Schencks* v. *United States*, 2 F. (2d) 185, 187 (App.D.C.); *Wagner* v. *United States*, 8 F. (2d) 581, 584 (C.C.A. 8th); *United States* v. *Rykowski*, 267 Fed. 866, 868–869 (S.D. Ohio); *United States* v. *Pitotto*, 267 Fed. 603, 604 (Ore.); *United States* v. *Armstrong*, 275 Fed. 506, 508 (S.D. Fla.). See also 24 Op. A. G. 685, 688; *United States* v. *Swan*, 15 F. (2d) 598, 599 (N.D. Cal.); *Rice* v. *United States*, 24 F. (2d) 479, 480 (C.C.A. 1st).

The statute under which the warrant involved in the instant case was issued applies not only to intoxicating liquor imported contrary to law but to any merchandise so imported. The divergent views

of the various courts which have passed on the question presented indicate that it is not free from doubt. Although but one Circuit Court of Appeals has, so far, considered the question, we think it is of sufficient importance to warrant the issuance of the writ.

Respectfully submitted.

J. CRAWFORD BIGGS,
Solicitor General.
NORMAN J. MORRISSON,
Special Assistant to the Attorney General.
PAUL D. MILLER,
JOHN J. BYRNE,
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Attorneys.

MAY 1933.

APPENDIX

DISCUSSION OF QUESTION WHETHER THERE WAS A PROPER BILL OF EXCEPTIONS

The testimony and documentary evidence relating to the search and seizure in question and the exception to the action of the District Judge in denying the defendant's motion to suppress appear in what is designated in the record as "Transcript of proceedings taken before Honorable John Boyd Avis, February 29, 1932." (R. 10–26.) The signature of the trial judge does not appear at the conclusion of this "Transcript," and there is lacking in the record the usual statement or certificate of the trial judge as to the authenticity of the bill of exceptions. However, immediately following the request of counsel for the petitioner for the allowance of an exception to the denial of his motion to suppress, there appears the following:

> (Defendant's counsel prays an exception, which is herel[b]y allowed and sealed accordingly.
>
> JOHN BOYD AVIS,
> (Sealed)).
>
> Mr. PEARSE. I now move for direction of a verdict.
>
> The COURT. The motion to direct will be denied. Do both parties rest?
>
> Mr. PEARSE. Yes.
>
> The COURT. A verdict of conviction will be rendered * * *

It would seem, therefore, that the allowance, signing, and sealing of the exception occurred at the

time that the exception was taken (although it does not appear that the proceedings were stopped until the evidence could be written up) and not subsequent to the trial, as is the usual practice. But we do not know of any reason why this may not be done. The rule that a bill of exceptions may be settled and allowed after the trial is obviously merely a rule of convenience. *Johnson* v. *Garber,* 73 Fed. 523 (C.C.A. 6th), and cases cited.

That the document containing the evidence and the exception was not entitled a "Bill of Exceptions" is, of course, immaterial. *Herbert* v. *Butler,* 97 U.S. 319, 320.

There would seem to be no question that the statutory requirement as to authentication was met by the signature of the District Judge who tried the case. R.S. Sec. 953, as amended (U.S.C., Title 28, Sec. 776); see also *United States* v. *Jarvis,* Fed. Cas. #15469, 26 Federal Cases 593, 595; *cf. Walton* v. *Southern Pac. Co.,* 53 F. (2d) 63, 65 (C.C.A. 9th). It was unnecessary for the judge to attach his seal. *Herbert* v. *Butler, supra.*

Nor was it necessary that the judge certify that the evidence set forth in the document was all the evidence which related to the exception. Such a certificate may be dispensed with if it may be fairly implied that all of the pertinent evidence was included in the bill. *Gunnison County Commissioners* v. *Rollins,* 173 U.S. 255, 262; *Crowe* v. *Trickey,* 204 U.S. 228, 235; *Taylor* v. *Maddux, Marshall & Co.,* 4 F. (2d) 447, 448 (App. D.C.); *Cincinnati H. & D. R. Co.* v. *Thiebaud,* 114 Fed. 918, 920–921 (C.C.A. 6th), but see *Key* v. *United States,* 26 F. (2d) 241, 242 (C.C.A. 8th). It would appear to be a reasonable inference from the frame of the

"transcript of proceedings" in the instant record and the recitals therein that it contained not only all the evidence relating to the denial of the motion to suppress but, indeed, all of the evidence introduced at the trial.

The "transcript of proceedings" indicates that the only witness called at the trial was one Laughlin, the customs officer who made the search. He was called by the Government (R. 11). Immediately after he took the stand to testify the counsel for the defendant renewed his motion to suppress and asked "that the testimony be heard by the court and decision reserved pending the taking of testimony as to the manner in which the agent obtained his information" (R. 11). When questioned by the court as to whether this meant that counsel desired to examine the witness in advance, counsel replied, "Not in advance. I am asking Your Honor to reserve decision until the coming in of the testimony in the case," to which the court assented (R. 11–12). Following the cross-examination of the witness by counsel for the defense (R. 19), the latter stated that "so far as the information against Jeremiah J. Nathanson is concerned, that is the facts relating to that information" (the criminal information filed against the petitioner). This was followed by a renewal by defendant's counsel of the motion to suppress, the denial of that motion, and the allowance, signing and sealing of the exception to the court's action (R. 20). Counsel for the defendant then immediately moved for a directed verdict, which was denied, after which both parties rested their case (R. 20). The court then announced that a verdict

of conviction would be rendered against the defendant (R. 20).

Also pertinent to the question whether the "transcript of proceedings" contained all the evidence is the fact that the record shows that the United States Attorney signed a stipulation that "the foregoing is a true transcript of the record of the said District Court in the above matter as agreed upon by the parties" (R. 25), and that the clerk of the District Court certified that "the annexed is a true copy of the transcript of record * * * as agreed upon by the parties per the foregoing stipulation * * *." *Cf. City of Detroit* v. *Grummond*, 121 Fed. 963 (C.C.A. 6th).

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In the Supreme Court of the United States

OCTOBER TERM, 1933

No. 39

J. J. NATHANSON, PETITIONER

v.

UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE UNITED STATES

OPINIONS BELOW

No opinion was rendered by the District Court. The opinion of the Circuit Court of Appeals (R. 18–23) is reported in 63 F. (2d) 937.

JURISDICTION

The judgment of the Circuit Court of Appeals was entered March 1, 1933 (R. 22). The petition for certiorari was filed April 26, 1933, and was granted May 29, 1933 (R. 23). Jurisdiction to issue the writ is conferred by Section 240 (a) of

the Judicial Code, as amended by the Act of February 13, 1925.

QUESTION PRESENTED

Whether the trial court erred in refusing to suppress evidence obtained upon a warrant to search a dwelling house issued, under Section 595 of the Tariff Act of 1922, to a customs officer upon the officer's sworn statement that he had cause to suspect and did believe that certain liquors of foreign origin upon which the duties had not been paid were concealed in the dwelling house to be searched.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fourth Amendment provides:

> The right of the people to be secure in their persons, houses, papers, and effects, against *unreasonable* searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized. (Italics ours.)

Section 595 of the Tariff Act of 1922, c. 356, Title IV, 42 Stat. 858, 983 (U.S.C., Title 19, Sec. 499), provides, so far as material here:

> WARRANT.—If any collector of customs or other officer, or person authorized to make searches and seizures shall have cause to suspect the presence in any dwelling house, store, or other building or place of any mer-

> chandise upon which the duties have not been paid, or which has been otherwise brought into the United States contrary to law, he may make application, under oath, to any justice of the peace, to any municipal, county, State, or Federal judge, or to any United States commissioner, and shall thereupon be entitled to a warrant to enter such dwelling house in the daytime only, or such store or other place at night or by day, and to search for and seize such merchandise * * *.

STATEMENT

Criminal information was filed June 11, 1930, by the United States Attorney for the District of New Jersey against Martin and J. J. Nathanson, charging them with the unlawful possession of whiskey and various other liquors (R. 3) an itemized list of which, indicating their foreign origin, will be found in the affidavits of the customs agent who searched for and seized them (R. 4–6). This customs agent, Francis B. Laughlin, testified that he "knew the Nathansons already," that he had information from Mr. Porter, the prohibition agent in charge in Atlantic City, and some of his agents, as well as from an informer, whose name was not allowed to be given, tending to show that the Nathansons were engaged in smuggling liquors or other merchandise, in the night-time, and concealing it on their premises, that this information confirmed his own belief about what was going on and

in accordance therewith he made sworn complaint before Hon. Wm. H. Smathers, Judge of the Common Pleas of Atlantic County, New Jersey, who thereupon and after ascertaining the sources of the customs agent's suspicion and belief, issued a search warrant, authorizing him to enter and search the premises and to seize the merchandise. This warrant was introduced as Defendant's Exhibit No. 1 and the evidence above narrated was brought out by his counsel (R. 9–14), who waived proof of the alcohol content of the merchandise which was seized (R. 9) and proposed that Martin Nathanson would plead guilty if J. J. Nathanson (petitioner) was convicted, to which the court and the United States Attorney agreed (R. 15).

The customs agent further testified as to the method of search, as to finding the liquors in a wooden gutter along one side of the cellar of the house, occupied as a dwelling, and as to handing Mrs. Nathanson the warrant and receipt for the liquors (R. 9). This occurred in the early afternoon of May 1, 1930, according to the agent's affidavit (R. 5). The agent also testified that he acted, in obtaining the warrant and making the search and seizure, as a customs agent looking for smuggled goods and not for or at the instance of the prohibition agents, although in part upon information furnished by them (R. 11, 12).

J. J. Nathanson was adjudged guilty, fined $500, and appealed, having made a preliminary motion to suppress the evidence and for a directed verdict.

The judgment was affirmed by the Circuit Court of Appeals for the Third Circuit in an opinion filed March 1, 1933 (R. 18–22).

ARGUMENT

The affidavit of the customs agent, upon which the warrant issued, does not appear in the record, but in part it is set out on page 3 of the brief filed for petitioner in this Court and in the opinion of the Circuit Court of Appeals, which states (R. 19):

> The affidavit of the customs agent set forth that the affiant "has cause to suspect and does believe that certain merchandise, to-wit: liquors of Canadian and other foreign origin, a more particular description of which cannot be given, upon which the duties have not been paid, or which has otherwise been brought into the United States contrary to law, and that said merchandise is now deposited and contained within the premises of J. J. Nathanson.

The search warrant, introduced by defendant, also recited that the agent made a sworn complaint before and was examined by the County Judge (R. 10), and the agent testified that he made the affidavit (R. 11) which was in the customary form (R. 13, 15). It is safe to state, therefore, that it complied fully with the requirements of Section 595, of the Tariff Act of 1922, under which the warrant issued. This Act, and particularly this section, goes back to the Act of July 31, 1789, c. 5, 1 Stat. 29, Section 24, which provides (1 Stat. 43):

> That every collector, naval officer and surveyor, or other person specially appointed by either of them for that purpose, shall have full power and authority, to enter any ship or vessel, in which they shall have reason to suspect any goods, wares or merchandise subject to duty shall be concealed; and therein to search for, seize, and secure any such goods, wares or merchandise; and if they shall have cause to suspect a concealment thereof, in any particular *dwelling-house*, store, building, or other place, they or either of them shall, upon application on oath or affirmation to any justice of the peace, be entitled to a warrant to enter such house, store, or other place (in the day time only) and there to search for such goods, and if any shall be found, to seize and secure the same for trial; and all such goods, wares and merchandise, on which the duties shall not have been paid or secured, shall be forfeited. (Italics ours.)

In Section 5, Act of April 18, 1806, 2 Stat. 379, 380, prohibiting the importation of certain goods, it was similarly provided:

> That every collector, naval officer, surveyor, or other officer of the customs, shall have the like power and authority to seize goods, wares and merchandise imported contrary to the intent and meaning of this act, to keep the same in custody until it shall have been ascertained whether the same have been forfeited, or not, and to enter any ship or vessel, *dwelling-house*, store, building or

> other place, for the purpose of searching for and seizing any such goods, wares and merchandise, which he or they now have by law, in relation to goods, wares and merchandise subject to duty; * * * (Italics ours.)

and in the Internal Revenue Act, R.S. 3462, as amended, U.S.C., Title 26, Sec. 1195, the corresponding provision is:

> The several judges of the district courts of the United States, and United States commissioners, may, within their respective jurisdictions, issue a search warrant, authorizing any internal-revenue officer to search any premises within the same, if such officer makes oath in writing that he has reason to believe, and does believe, that a fraud upon the revenue has been or is being committed upon or by the use of the said premises.

It will, of course, be observed that the prohibition of the Fourth Amendment is against *unreasonable* searches and seizures, as emphasized in the concurring opinion in *Boyd* v. *United States,* 116 U.S. 616, 641:

> The things here forbidden are two—search and seizure. And not all searches nor all seizures are forbidden, but only those that are unreasonable. Reasonable searches, therefore, may be allowed, and if the thing sought be found, it may be seized.
>
> * * * * *
>
> While the framers of the Constitution had their attention drawn, no doubt, to the

abuses of this power of searching private houses and seizing private papers, as practiced in England, it is obvious that they only intended to restrain the abuse, while they did not abolish the power. Hence it is only *unreasonable* searches and seizures that are forbidden, and the means of securing this protection was by abolishing searches under warrants, which were called general warrants, because they authorized searches in any place, for any thing.

This was forbidden, while searches founded on affidavits, and made under warrants which described the thing to be searched for, the person and place to be searched, are still permitted.

The Eighteenth Amendment and the National Prohibition Act were, of course, unheard of when the Constitution was adopted, but this is not true of smuggling and, hence, we have the same Congress which proposed the Fourth Amendment for adoption passing the Act of July 31, 1789, which, practically speaking, has been in force ever since and is virtually the Tariff Act of 1922 as it relates to searches and seizures. From the very beginning, therefore, it was recognized that searches and seizures were necessary to maintain revenue and to prevent violations of the customs and navigation laws; and equally so that to be effective they could not await conviction upon proof beyond a reasonable doubt, or upon the production of prima facie evidence, but that the search was reasonable or per-

missible if the customs officer acted upon bona fide belief and justified suspicion or information that appeared to be reliable.

Thus in *Boyd* v. *United States, supra,* relied upon by petitioner, it is said (pp. 623–624):

> In the one case, the government is entitled to the possession of the property; in the other it is not. The seizure of stolen goods is authorized by the common law; and the seizure of goods forfeited for a breach of the revenue laws, or concealed to avoid the duties payable on them, has been authorized by English statutes for at least two centuries past; and the like seizures have been authorized by our own revenue acts from the commencement of the government. The first statute passed by Congress to regulate the collection of duties, the act of July 31, 1789, 1 Stat. 29, 43, contains provisions to this effect. As this act was passed by the same Congress which proposed for adoption the original amendments to the Constitution, it is clear that the members of that body did not regard searches and seizures of this kind as "unreasonable," and they are not embraced within the prohibition of the amendment. So, also, the supervision authorized to be exercised by officers of the revenue over the manufacture or custody of excisable articles, and the entries thereof in books required by law to be kept for their inspection, are necessarily excepted out of the category of unreasonable searches and seizures. * * *.

Similarly, in support of the revenue laws (Act of July 13, 1866, c. 184, 14 Stat. 98, Sec. 3450, R.S.), Congress prescribed the forfeiture not only of goods and commodities evading payment of taxes, but of conveyances used in their removal and in *Goldsmith-Grant Co.* v. *United States,* 254 U.S. 505, this Court upheld the same as no violation of the Fifth Amendment even if such use of the conveyance was without the knowledge and against the will of its innocent owner, saying (p. 510):

> Regarded in this abstraction the argument is formidable, but there are other and militating considerations. Congress must have taken into account the necessities of the Government, its revenues and policies, and was faced with the necessity of making provision against their violation or evasion and the ways and means of violation or evasion. * * *

Likewise, in *General Motors Corp.* v. *United States,* 286 U.S. 49, at page 57, it is said:

> The forfeiture may be enforced even against innocent owners, though the Secretary of the Treasury may remit it, upon such terms as he deems reasonable, if satisfied that there was neither wilful negligence nor intent to violate the law. R. S. Sec. 3078; Tariff Acts of 1922 and 1930, Secs. 613, 618. The penalty is at times a hard one, but it is imposed by the statute in terms too clear to be misread.

And in the same case it is held (p. 56):

> The importation of intoxicating liquors without permit and without payment of customs duties is a violation of the tariff act and a criminal offense thereunder. This was the law under the tariff act of 1922, enacted after the adoption of the Eighteenth Amendment. Tariff Act of 1922, c. 356, Sec. 593 b, 42 Stat. 982; U. S. C., Title 19, Sec. 497. It is still the law under the present tariff act of 1930; U. S. C., Title 19, Sec. 1593. * * *

While it may not be necessary to go as far as did the Circuit Court of Appeals, Second Circuit, in *United States* v. *Federal Mail Order Corp.*, 47 F. (2d) 164, 165, C.C.A. 2d), in saying:

> Were a practice shown antedating 1789, by which it was customary to seize smuggled goods upon a showing of no more than the unsupported suspicion of a customs officer, it may well be that this should be recognized as an exception to the amendment * * *

it is certain the Fourth Amendment did not contemplate that the cellar of a man's house should afford safe haven for smuggled goods or constitute a barrier against those authorized and required to find them. It seems, therefore, that good ground may exist for the distinction made by the Circuit Court in this case, when it said (R. 19–20, 22):

> Had this warrant issued under authority of the Prohibition Act it would be invalid,

since the affidavit was merely based upon cause to suspect and suspicion * * *

but

> In the instant case the seizure was under the tariff laws. The government had a pecuniary interest in the smuggled goods. Following the reasoning in the cases cited, we conclude that that interest was sufficient to justify the issuance of the search warrant and that the search and seizure, based on the sworn complaint (phrased almost in the very words of the Tariff Act) and the warrant thereon, did not violate the constitutional rights of the defendant.

It then rested its decision upon the authority of *Bookbinder* v. *United States,* 287 Fed. 790 (C.C.A. 3d), certiorari denied, 262 U.S. 748, which concludes (p. 796):

> The plaintiff in error next contends that the search warrant under which his liquors were found and seized was invalid because issued under the Customs Laws and not under the National Prohibition Act, and invalid because of its own infirmities, and that, in consequence, the evidence produced thereby should not have been admitted against him. We subscribe to the reasoning of the learned trial judge before whom this question was argued. Therefore, in affirming his conclusion, we shall do nothing more than cite the authorities upon which it is based, keeping clearly in mind the distinction between a seizure, as here, of smuggled

goods and a seizure of liquors believed to be in stock for the purpose of illicit sale. Locke v. United States, 11 U. S. 337; Boyd v. United States, 116 U. S. 616; Gouled v. United States, 255 U. S. 298, 41 Sup. Ct. 261, 65 L. Ed. 647; United States v. Ray & Schultz (D. C.), 275 Fed. 1005; United States v. Rykowski (D. C.), 267 Fed. 866; United States v. Kelih (D. C.), 272 Fed. 484; Weeks v. United States, 232 U. S. 383, 34 Sup. Ct. 341, 58 L. Ed. 652, L. R. A. 1915B, 834, Ann. Cas. 1915C, 1177; Silverthorne v. United States, 251 U. S. 385, 40 Sup. Ct. 182, 64 L. Ed. 319; Veeder v. United States, 252 Fed. 414, 164 C. C. A. 338; certiorari denied, see United States v. Veeder, 246 U. S. 675, 38 Sup. Ct. 428, 62 L. Ed. 933; In re Tri-State Coal & Coke Co. (D. C.), 253 Fed. 605; Amos v. United States, 255 U. S. 313, 41 Sup. Ct. 266, 65 L. Ed. 654.

It is now settled that when liquors have been lawfully obtained under a valid search warrant they may be used as evidence by the government in prosecuting a person for an offense different from that charged against him in the affidavit upon which the search warrant was issued. Gouled v. United States, 255 U. S. 298, 41 Sup. Ct. 261, 65 L. Ed. 647.

The immediate question which emerges is whether the search and seizure in Nathanson's case was unreasonable and without probable cause, unsupported by oath or affirmation within the meaning

of the Fourth Amendment. Perhaps the readiest reply to be made is that

> There is no formula for the determination of reasonableness. Each case is to be decided on its own facts and circumstances. * * *

as was said in *Go-Bart Co.* v. *United States,* 282 U.S. 344, at p. 357, but here we deal with a single case which is fairly representative of a large class of cases, hence the importance of distinguishing between searches and seizures under the Customs and Revenue laws and those under the National Prohibition and Espionage Acts. Certainly as far back as the Fourth Amendment itself, Congress recognized the necessity of allowing entry into dwelling houses, under search warrants, in order to find and seize smuggled goods likely to be concealed therein, and by the Act of July 31, 1789, *supra,* provided (1 Stat. 43):

> * * * if they [the authorized officers] shall have cause to suspect a concealment thereof, in any particular dwelling-house * * * they or either of them shall, upon application on oath or affirmation to any justice of the peace, be entitled to a warrant to enter such house * * * (in the day time only) and there to search for such goods, and if any shall be found, to seize and secure the same for trial * * *

it being in the nature of a proceeding in rem. This was somewhat strengthened by the Tariff Act of 1922, which authorized entry and search of a dwell-

ing house only in the day time, but of a store, or other building or place at night or by day; otherwise the essentials in both are that the officer should have "cause to suspect" and should make oath or affirmation of that fact upon his application for a warrant. The requirement of the Internal Revenue Act, *supra,* is substantially the same (U.S.C., Title 26, Sec. 1195):

> * * * if such officer makes oath in writing that he has reason to believe, and does believe, that a fraud upon the revenue has been or is being committed upon or by the use of said premises.

In Nathanson's case, the customs officer not only had cause to suspect, of which he made sworn complaint, but direct information, which he believed to be reliable and which he disclosed to the judge who considered the same and issued the warrant pursuant to the statute; nor does the fact that this information came from prohibition agents who had been on the lookout and from an informer, detract from it, especially as it turned out to be correct. It is hardly to be expected or required in this class of cases that the customs agent or some other eyewitness who reported to him must have seen the goods as they left Canada, or other foreign country, and arrived in New Jersey by speed boat, airplane, or automobile, and watched the identical goods as they were carried into Nathanson's cellar in the nighttime, a practical impossibility. Thus it was said by Chief Justice Marshall in *Locke* v. *United States,* 7 Cranch 339, 347:

> It is contended, that probable cause means *prima facie* evidence, or, in other words, such evidence as, in the absence of exculpatory proof, would justify condemnation. This argument has been very satisfactorily answered on the part of the United States, by the observation, that this would render the provision totally inoperative. It may be added, that the term "probable cause," according to its usual acceptation, means less than evidence which would justify condemnation; and in all cases of seizure, has a fixed and well-known meaning. It imports a seizure made under circumstances which warrant suspicion. In this, its legal sense, the court must understand the term to have been used by congress.

As to searches and seizures under the National Prohibition and Espionage Acts it may be admitted that the rule is otherwise, but so are the Acts of Congress relating to them and there is a legal distinction to be observed. The requirements are altogether different. Under the National Prohibition Act, c. 85, 41 Stat. 305, 315 (U.S.C., Title 27, Sec. 39):

> No search warrant shall issue to search any private dwelling occupied as such unless it is being used for the unlawful sale of intoxicating liquor, or unless it is in part used for some business purpose such as a store, shop, saloon, restaurant, hotel, or boarding house. * * *

in addition to which it is prescribed in the Espionage Act that the complainant and other witnesses

shall be examined or their depositions taken with a degree of particularity that is not required under the Customs and Revenue laws.

There may be several reasons for this difference. Searches and seizures under the Prohibition and Espionage Acts, are, as a general statement, intended to procure evidence primarily for the purpose of convicting a defendant, and the warrants may be sworn out by any person producing evidence or making the necessary affidavit. This, we assume, is what is meant in *Grau* v. *United States,* 287 U.S. 124, 128, in which the Court said:

> A search warrant may issue only upon evidence which would be competent in the trial of the offense before a jury (*Giles* v. *United States,* 284 Fed. 208; *Wagner* v. *United States,* 8 F. (2d) 581); and would lead a man of prudence and caution to believe that the offense has been committed. *Steele* v. *United States,* 267 U. S. 498, 504. Tested by these standards the affidavit was insufficient. While a dwelling used as a manufactory or headquarters for merchandising may well be and doubtless often is the place of sale, its use for those purposes is not alone probable cause for believing that actual sales are there made.

On the other hand, under the Customs and Revenue laws, the primary purpose is to collect revenue, and prevent smuggling, and it is contemplated that the warrant will be applied for by an officer of some standing and experience who ordinarily will act with a reasonable amount of discretion, without be-

ing overcome by excessive zeal or personal prejudice. Besides, to apply the same rule in this class of cases "would render the provision totally inoperative," as observed by Chief Justice Marshall in *Locke* v. *United States, supra,* p. 16.

It is also important to observe that Section 23 of the Act of June 15, 1917, c. 30, Title XI, 40 Stat. 230 (U.S.C., Title 18, Sec. 633), expressly saves the provisions of the Customs and Revenue laws—

> Nothing contained in this title shall be held to repeal or impair any existing provisions of law regulating search and the issue of search warrants.

As was observed by Mr. Justice Cardozo in *General Motors Corp.* v. *United States,* 286 U.S. 49, 61, 62:

> To refuse to give heed to these distinctions will lead us into a morass of practical difficulties as well as doctrinal refinements. * * * We cannot bring ourselves to believe that Congress had in view the creation of so great a breach in historic remedies and sanctions. * * * Indeed, the breach, if we once allow it, will hardly be confined within the ramparts of the acts that regulate the duties upon imports. If a forfeiture under the customs laws is forbidden where there has been an unlawful importation of intoxicating liquors, we shall have difficulty in upholding a forfeiture where there has been a violation of the navigation laws or other cognate statutes. Already the net of these complexities has entangled the decisions. Cf. *The Ruth Mildred, post,* p.

67, and *General Import & Export Co.* v. *United States, post,* p. 70. Courts accepting the conclusion that the customs forfeitures are ended in respect of intoxicating liquors have been unable to extricate themselves from the conclusion that forfeitures under the navigation acts have fallen at the same time. A halt must be called before the tangle is so intricate that it can no longer be unraveled.

The fact that the search warrant was obtained and seizure made under the Tariff Act, but that Nathanson was convicted under the Prohibition Law, affords no ground for reversal, nor is the question raised in his behalf. *Gouled* v. *United States,* 255 U.S. 298.

CONCLUSION

We submit, therefore, that the question involved is of importance and that serious consequences are likely to ensue if it be held that the requirements of the National Prohibition and Espionage Acts must be observed in obtaining warrants for searches and seizures under the Customs and Revenue laws; and that this case, in particular, presents no occasion for overturning a statute that is contemporaneous with the Fourth Amendment.

Respectfully,

J. CRAWFORD BIGGS,
Solicitor General.

ANGUS D. MACLEAN,
Assistant Solicitor General.

U. S. GOVERNMENT PRINTING OFFICE: 1933

SUPREME COURT OF THE UNITED STATES.

No. 39.—October Term, 1933.

J. J. Nathanson, Petitioner, vs. The United States of America.	On Writ of Certiorari to the United States Circuit Court of Appeals for the Third Circuit.

[November 6, 1933.]

Mr. Justice McReynolds delivered the opinion of the Court.

In the trial court where he was defendant under a criminal information, petitioner Nathanson duly, but unsuccessfully, challenged the admission as evidence of certain liquors seized under color of a search warrant issued, he claimed, in violation of the Fourth Amendment. The Circuit Court of Appeals affirmed the judgment against him.

Upon complaint of the customs agent in charge, a State judge sent out the questioned warrant. Its pertinent recitals and command follow.

> "Whereas said Francis B. Laughlin has stated under his oath that he has cause to suspect and does believe that certain merchandise, to wit: Certain liquors of foreign origin a more particular description of which cannot be given, upon which the duties have not been paid, or which has otherwise been brought into the United States contrary to law, and that said merchandise is now deposited and contained within the premises of J. J. Nathanson said premises being described as a 2 story frame dwelling located at 117 No. Bartram Ave. . . .; and
>
> "Whereas said Francis B. Laughlin has requested that a warrant issue to him, authorizing him to enter said premises and search for and seize said merchandise:
>
> "Now, therefore, you are commanded, in the name and by the authority of the President of the United States, to enter and search the premises hereinbefore described, in the day-

time (if a dwelling house) at any time of the day or night (if other than a dwelling house) and to seize and take into your possession the merchandise hereinbefore described, or so much thereof as may be found, to the end that the same may be dealt with according to law."

The Circuit Court of Appeals said—"The appellant contends that the affidavit upon which the search warrant was issued showed no facts upon which to base a finding of probable cause; that the search warrant was therefore illegal; and that the use of the property so seized as evidence in a criminal prosecution amounted to a violation of the protection afforded by the Fourth Amendment to the Constitution. . . .

"Had this warrant issued under authority of the Prohibition Act, it would be invalid, since the affidavit was merely based upon cause to suspect and suspicion. It issued, however, under the authority of [Sec. 595] the Tariff Act of 1930 . . ." (46 Stat. 752, c. 497; 19 U. S. C. A. Supp. 1595). [This is identical with Sec. 595, Tariff Act of 1922, 42 Stat. 983, c. 356, copied in the margin*.]

And it held—"In the instant case the seizure was under the tariff laws. The Government had a pecuniary interest in the smuggled goods. Following the reasoning in the cases cited, we conclude that that interest was sufficient to justify the issuance of the search warrant and that the search and seizure, based on the sworn complaint (phrased almost in the very words of the Tariff Act) and the warrant thereon, did not violate the constitutional rights of the defendant. This court in *Bookbinder* v. *United States*, 287 Fed. 790, certiorari denied, 262 U. S. 748, held that evidence obtained on a search warrant for violation of the customs laws is admissible in a prosecution for violation of the prohibition laws."

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*Act 1922 and Act of 1930. Sec. 595. Searches and seizures. (a) Warrant. If any collector of customs or other officer or person authorized to make searches and seizures shall have cause to suspect the presence in any dwelling house, store, or other building or place of any merchandise upon which the duties have not been paid, he may make application, under oath, to any United States contrary to law, he may make application, under oath, to any justice of the peace, to any municipal, county, State, or Federal judge, or to any United States commissioner, and shall thereupon be entitled to a warrant to enter such dwelling house in the daytime only, or such store or other place at night or by day, and to search for and seize such merchandise. . . .

We think the court below acted upon an erroneous view. Its judgment must be reversed.

This court has often spoken concerning searches and seizures and the limitations of the Fourth Amendment. *Locke* v. *United States*, 7 Cranch 339; *Boyd* v. *United States*, 116 U. S. 616; *Adams* v. *United States*, 192 U. S. 585; *Weeks* v. *United States*, 232 U. S. 383; *Gouled* v. *United States*, 255 U. S. 298; *Byars* v. *United States*, 273 U. S. 28; *Maul* v. *United States*, 274 U. S. 501; *Go-Bart Importing Co.* v. *United States*, 282 U. S. 344; *United States* v. *Lefkowitz*, 285 U. S. 452. See also Cooley, Constitutional Limitations, 7th Ed., p. 427.

Here, we are dealing with a warrant to search a private dwelling said to have been authorized by the Tariff Act. It went upon a mere affirmation of suspicion and belief without any statement of adequate supporting facts.

All unreasonable searches and seizures are absolutely forbidden by the Fourth Amendment. In some circumstances a public officer may make a lawful seizure without a warrant; in others he may act only under permission of one. In the present case the place of search and seizure was a private dwelling. The challenged warrant is said to constitute adequate authority therefor. The legality of the seizure depends upon its sufficiency. Did it issue upon probable cause supported by oath or affirmation within the intendment of the Amendment?

The Amendment applies to warrants under any statute; revenue, tariff, and all others. No warrant inhibited by it can be made effective by an act of Congress or otherwise.

It is argued that searches for goods smuggled into the United States in fraud of the revenue, based upon affidavits of suspicion or belief, have been sustained from the earliest times; that this practice was authorized by the Revenue Act of July 31, 1789, 1 Stat. 43, also subsequent like enactments. But we think nothing in these statutes indicates that a warrant to search a private dwelling may rest upon mere affirmance of suspicion or belief without disclosure of supporting facts or circumstances.

Although relied upon, we find nothing in *Locke* v. *United States* and *Boyd* v. *United States* which upholds the view of the Circuit Court of Appeals. The first of these causes was a proceeding to forfeit a cargo of imported goods seized for violation

of the revenue laws. It presented no question concerning the validity of a warrant. The second denied the right to compel production of private papers in a suit by the United States to establish a forfeiture of goods fraudulently imported.

Under the Fourth Amendment, an officer may not properly issue a warrant to search a private dwelling unless he can find probable cause therefor from facts or circumstances presented to him under oath or affirmation. Mere affirmance of belief or suspicion is not enough.

Reversed.

A true copy.

Test:

Clerk, Supreme Court, U. S.